SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 567

HARVEY STEMMER, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

No. 568

DAVID KRAKOWER, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 8, 1949.

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[fol. 1]

NEW YORK SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

HARVEY STEMMER and DAVID KRAKOWER, alias DAN KRAMER, alias Peter Krakauer, alias Abe Goldstein, Defendants-Appellants, and Jerry Zarowitz, Defendant

STATEMENT UNDER RULE 234

This is an appeal by defendants from the judgment upon their conviction of the crime of Bribery, rendered on the 2nd day of April, 1947, at a term of the Court of General Sessions of the County of New York, after a trial had before the Hon. Saul S. Streit, Judge of said Court, and a jury.

The indictment herein, charging said defendants with the crime of Bribery and Conspiracy, was filed in the said Court of General Sessions on the 27th day of January, 1947. A plea of not guilty was entered by defendant Stemmer on [fol. 2] January 28, 1947 and by defendant Krakower on January 31, 1947.

Hon. Frank S. Hogan, District Attorney of the County of New York, represented the People herein, and Henry A. Lowenberg, Esq., represented the defendant Stemmer at the trial and Joseph Lonardo, Esq. represents him on this appeal and Samuel J. Segal, Esq. represented the defendant Krakower at the trial and Harry G. Anderson, Esq. represents him on this appeal. There are no other changes.

[fol. 3] COURT OF GENERAL SESSIONS, NEW YORK COUNTY

Indictment #310/47

THE PEOPLE OF THE STATE OF NEW YORK

against

HARVEY STEMMER, Defendant

NOTICE OF APPEAL OF DEFENDANT HARVEY STEMMER

SIRS:

Please take notice, that the above defendant hereby appeals from the judgment of conviction rendered against him herein on April 2, 1947 to the Appellate Division of the Supreme Court.

Dated, Flushing, N. Y., April 18, 1947.

Yours, etc., Joseph Lonardo, Attorney for Appellant, 135-26 No. Boulevard, Flushing, New York.

To: Clerk of Above Court, District Attorney, New York County.

Received 1947 Apr. 21, P. M. 12 56. Clerk's Office, Court of General Sessions.

[fol. 4] COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

DAVID KRAKOWER (impleaded with Harvey Stemmer and Jerry Zarowitz), Defendant

NOTICE OF APPEAL OF DEFENDANT DAVID KRAKOWER

Please take notice that the defendant David Krakower hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of the Court of General Sessions of the County of New York, rendered April 2, 1947, convicting the said defendant of

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bribery, and said defendant appeals from each and every part of the said judgment.

Dated: New York, April 16, 1947.

Yours, etc., Harry G. Anderson, Attorney for Defendant, Office & P. O. Address, 70 Pine Street, New York City.

To: Honorable Frank S. Hogan, District Attorney, New York County. Clerk of the Court of General Sessions, New York County.

[fol. 5] COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

against

HARVEY STEMMER, DAVID KRAKOWER, alias Dan Kramer, alias Peter Krakauer, alias Abe Goldstein and Jerry Zarowitz, Defendants

INDICTMENT

The Grand Jury of the County of New York, by this indictment, accuse the above-named defendants of the crime of Bribery, in violation of Section 382 of the Penal Law, committed as follows:

One Alvin J. Paris, in the County of New York, from on or about December 9, 1946 to on or about December 11, 1946, promised and offered a professional football player, to wit, Merle Alison Hapes, a member of the New York Football Giants, the sum of $2500, in currency of the United States of America, and promised and offered to bet and wager for the benefit of said Merle Alison Hapes, the sum of $1,000, with intent to influence said Merle Alison Hapes to lose and try to lose and cause to be lost a professional football game [fol. 6] between the Chicago Bears and the New York Giants, to be played on December 15, 1946, in the County of New York, in which game the said Merle Alison Hapes was to be a player and participant.

And the defendants Harvey Stemmer, David Krakower alias Dan Kramer alias Peter Krakauer alias Abe Gold-

stein, and Jerry Zarowitz, in the County of New York, were concerned in the commission of said bribery and felony by Alvin J. Paris, in the manner and form aforesaid, in that they aided, assisted and abetted said Alvin J. Paris in its commission, and directly and indirectly counselled, commanded, induced and procured said Alvin J. Paris to commit said bribery and felony.

Second Count:

And the Grand Jury Aforesaid, by this indictment, further accuse said defendants of the crime of Bribery, in violation of Section 382 of the Penal Law, committed as follows:

One Alvin J. Paris, in the County of New York, from on or about December 10, 1946 to on or about December 11, 1946, promised and offered a professional football player, to wit, Francis Joseph Filchock, a member of the New York Football Giants, the sum of $2500, in currency of the United States of America, and promised and offered to bet and wager for the benefit of said Francis Joseph Filchock, the sum of $1,000, with intent to influence said Francis Joseph Filchock to lose and try to lose and cause to be lost a professional football game between the Chicago Bears and the [fol. 7] New York Giants, to be played on December 15, 1946, in the County of New York, in which game the said Francis Joseph Filchock was to be a player and participant.

And the defendants Harvey Stemmer, David Krakower alias Dan Kramer alias Peter Krakauer alias Abe Goldstein, and Jerry Zarowitz, in the County of New York, were concerned in the commission of said bribery and felony by Alvin J. Paris, in the manner and form aforesaid, in that they aided, assisted and abetted said Alvin J. Paris in its commission, and directly and indirectly counselled, commanded, induced and procured said Alvin J. Paris to commit said bribery and felony.

Third Count:

And the Grand Jury aforesaid, by this indictment, further accuse said defendants of the crime of Conspiracy, committed as follows:

Said defendants, in the County of New York, from on or about December 9, 1946 to on or about December 11, 1946, conspired to commit the crime of Bribery of Participants in

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Professional Games, in violation of section 382 of the Penal Law, and to commit acts injurious to the public morals, in that said defendants, while acting in concert with one Alvin J. Paris, unlawfully conspired to promise and offer professional football players Merle Alison Hapes and Francis Joseph Filchock, members of the New York Football Giants, the sum of $2500., in currency of the United States of America and promised and offered to bet and wager for the benefit of said Merle Alison Hapes and Francis Joseph [fols. 8-16] Filchock, the sum of $1000., with intent to influence said Merle Alison Hapes and Francis Joseph Filchock to lose and try to lose and cause to be lost a professional football game between the Chicago Bears and the New York Giants, to be played on December 15, 1946, in the County of New York, in which game the said Merle Alison Hapes and Francis Joseph Filchock were to be players and participants.

Part 8 Mar 3—1947

On motion of Dist. Atty; Counsel for all defendants opposing, it is Ordered that 3rd count charging Crime of Conspiracy be amended so that date of commission of said crime shall now read "from on or about December 9, 1946 to on or about December 14, 1946."

Saul S. Streit, Judge of the Court of General Sessions.

Overt Acts

1. In furtherance of said conspiracy and to effect the objects thereof, on or about December 10, 1946, in the County of New York, said conspirator Alvin J. Paris met and conferred with the said professional football player Merle Alison Hapes, in premises 56 West 56th Street.

2. In furtherance of said conspiracy and to effect the objects thereof, on or about December 10, 1946, in the County of New York, said conspirator Alvin J. Paris met and conferred with the said professional football player Francis Joseph Filchock.

Frank S. Hogan, District Attorney.

[fol. 17] At a Court of General Sessions of the County of New York, holden in and for the County of New York, at the Building for Criminal Courts in the Borough of Manhattan of the City of New York, on Monday, the 3rd day of March, in the year of our Lord, one thousand nine hundred and forty seven.

Present,

The Honorable SAUL S. STREIT,
Judge of the Court of General Sessions.

EXTRACT OF CLERK'S MINUTES OF TRIAL AND JUDGMENT

Harvey Stemmer, David Krakower, alias Dan Kramer, alias Peter Krakauer, alias Abe Goldstein and Jerry Zarowitz are severally arraigned at the bar upon an indictment for Bribery and Conspiracy—Ind. No. 310-47—filed Jan. 27/47, and having heard the indictment read, and being asked whether they demanded a trial thereon, answer that they do require a trial and say that they are not guilty thereof.

The District Attorney moves to amend the third count of the indictment charging the crime of Conspiracy by changing the date of the commission of the crime therein to read "from on or about December 9, 1946 to on or about December 14, 1946."

Counsel for each of the defendants opposes said motion. [fol. 18] After hearing the District Attorney and Counsel for defendants it is Ordered that the indictment be amended so that the third count of the indictment charging the crime of Conspiracy shall read "from on or about December 9, 1946 to on or about December 14, 1946."

The District Attorney and Counsel for each defendant severally consenting thereto, the Court allows ten peremptory challenges for the People and ten peremptory challenges for the defendants jointly.

The balloting for a Jury is begun from the additional Panel of jurors summoned to attend this day. As each juror is called he is sworn individually as to his competency and the following jurors are duly accepted and sworn.

The Jury

Herman Schwamm, Allen Thompson, Harry Haber, Frederick W. Thomas, Irving Newman, Fred F. Kuhn, Hilda Rothstein, Haskell Eetkin, Augusta G. Gottheimer, Irving Schoenholz, Adolph Goldner, Abraham Zurkowitz.

The court ordered two Alternate Jurors be balloted and sworn.

Alternate Jurors: 1 Pearl Press, 2 Helen V. Kerr.

[fol. 19] Ordered by the court that the Jury and Alternate

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Jurors be kept together for the duration of the trial in charge of sworn officers.

Friday Morning, March 7, 1947.

COURT MEETS: PRESENT, AS BEFORE

The Court admonishes the Jury and they retire to the jury room.

Mr. Lowenberg, Counsel for Harvey Stemmer, moves to dismiss the first, second and third counts of the indictment. Motion denied.

Mr. Lowenberg further moves to dismiss the entire indictment. Motion denied.

Mr. Segal, Counsel for David Krakower, makes similar motions. Motions denied.

Mr. Barshay, Counsel for Jerry Zarowitz, moves to dismiss the first count of the indictment. The Court reserves decision.

Mr. Barshay further moves to dismiss the second and third counts of the indictment. Motion denied.

In the absence of the Jury, Mr. Lowenberg, in behalf of Harvey Stemmer, renews his motion to dismiss the first, second and third counts of the indictment. Motion denied.

Mr. Segal, Counsel for David Krakower, renews his motion to dismiss the first count of the indictment. Motion granted. Ordered by the Court that the first count of the indictment as to David Krakower be dismissed.

Mr. Segal moves to dismiss the second and third counts of the indictment. Motion denied.

[fol. 20] Mr. Barshay, in behalf of Jerry Zarowitz, moves to dismiss the first count of the indictment. Motion granted. Ordered by the Court that the first count of the indictment be dismissed as to Jerry Zarowitz.

Mr. Barshay moves to dismiss the second and third counts of the indictment. Motion Denied.

Saturday Morning, March 8, 1947.

COURT MEETS: PRESENT, AS BEFORE

At 10:40 A.M. Court charges the Jury, and submits to them the following counts as to each defendant:

As to Harvey Stemmer the first, second and third counts.

As to David Krakower and Jerry Zarowitz the second and third counts of the indictment. The Court concludes at 12:05 o'clock P.M.

The Alternate Jurors are discharged.

At 3:15 o'clock P.M. upon consent of the defendants personally and Counsel for the People, the exhibits marked in evidence are delivered to the jury in pursuance of their request. Upon consent of the defendants and Counsel for the People, two magnifying glasses are sent into the Jury for their use as requested.

At 4:33 o'clock P.M. the Jury come into Court to have the Court give them certain instructions as to the law and retire at 4:52 o'clock P.M.

At 8:56 o'clock P.M. the Jury return to the bar and say they find the Defendant Harvey Stemmer guilty of the [fol. 21] crimes of Bribery as charged in the first and second counts of the indictment and guilty of Conspiracy as charged in the third count of the indictment. The Jury is polled and severally confirm their verdict as to Harvey Stemmer. The jury say they find the defendant David Krakower guilty of Bribery as charged in the second count of the indictment and guilty of Conspiracy as charged in the third count of the indictment. The Jury is polled as to both counts and severally confirm their verdict as to defendant David Krakauer.

The Jury say that they find the defendant Jerry Zarowitz not guilty of the crime of Bribery as charged in second count of the indictment and guilty of the crime of Conspiracy as charged in the third count of the indictment. Jury is polled and severally confirm their verdict as to both counts as to defendant Jerry Zarowitz.

Counsel for each of the defendants reserves the right to make motions at the time of sentence, which is set for April 2, 1947.

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Wednesday Morning, April, 2, 1947.

COURT MEETS: PRESENT, AS BEFORE

The defendants are severally arraigned at the bar.

The District Attorney files an Information against the defendant David Krakower alias Dan Kramer alias Peter Krakauer alias Abe Goldstein accusing the defendant of having been previously convicted of three certain crimes which said crimes would then be felonious if committed [fol. 22] within this State. The Information is read to the defendant in open Court in presence of Counsel—he is advised of his rights &c. The defendant acknowledges he is the same person mentioned in said Information.

Counsel for defendant Harvey Stemmer makes two motions to set aside the verdict. The Court denies both motions.

Counsel moves in arrest of judgment. Motion denied.

Counsel for David Krakower alias Dan Kramer alias etc. moves to set aside the verdict and in arrest of judgment. Each motion denied.

Counsel for defendant Jerry Zarowitz makes two motions to set aside the verdict. The Court denies each motion.

The District Attorney moves for judgment against defendants.

It is thereupon demanded of the said Harvey Stemmer, David Krakower, alias Dan Kramer alias Peter Krakauer alias Abe Goldstein and Jerry Zarowitz what they each have to say why the judgment of the Court should not be pronounced against them according to law, who nothing further saith unless as before they had said.

Whereupon it is considered, ordered and adjudged by the Court that the said Harvey Stemmer for the felonies aforesaid whereof he is convicted as aforesaid be imprisoned in the State Prison at hard labor for

First Count:

not less than Two Years Six Months nor more than Five Years.

[fols. 23-537] Second Count:

not less than Two Years Six Months nor more than Five Years. This sentence to run consecutively to the sentence imposed on the first count.

Third Count:

Sentence Suspended.

And as to the defendant David Krakower alias Dan Kramer alias Peter Krakauer alias etc., for the felony aforesaid of Bribery as charged in the second count it is considered ordered and adjudged by the Court that the defendant be imprisoned in the State Prison at hard labor for

Second Count:

not less than Five Years nor more than Ten Years.

Third Count:

Sentence Suspended.

And as to the defendant Jerry Zarowitz for the crime of Conspiracy under the third count of the indictment, it is considered, ordered and adjudged by the Court that the defendant be imprisoned in the Penitentiary of the County of New York there to be dealt with according to law. The Court makes no recommendation as to duration of imprisonment.

A true extract from the minutes.

F. Howard Barrett, Clerk of Court.

[fol. 538] **Testimony**

Joseph L. Jove, Shield No. 3436, a Patrolman, attached to the Manhattan Borough Headquarters Squad, Police Department, City of New York, called as a witness on behalf of the People, being first duly sworn, testified as follows:

Direct examination.

By Mr. Monaghan:

Q. Officer Jove, how long have you been connected with the Police Department of New York City?

A. Nineteen years.

Q. And what is your present assignment?

A. I am a plainclothes man in the Borough of Manhattan, West, Headquarters.

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Q. How long have you had that assignment?

A. Since July, 1946.

Q. Were you detailed as a plainclothes man in December of 1946?

A. I was.

Q. Will you tell the Court and jury just what that detail consists of, what section of the city your detail takes in?

A. It takes in all the West Side of Manhattan Borough from the Battery to the boundaries of Yonkers.

Q. That would be west of Fifth Avenue over to the River, and from the Battery all the way up?

A. That's right.

Q. Have you ever made any installations for the interception of telephonic communications?

A. I have.

Q. How many times would you say you have made such installations?

A. About twenty, twenty-five times.

Mr. Monaghan: I ask to have these marked for identification.

[fol. 539] (Orders of the Supreme Court for the installation of telephone taps marked People's Exhibits 2, 3, and 4, for identification, respectively.)

Q. I show you People's Exhibits 2, 3, and 4, for identification, and ask you to look at them.

A. (Witness does so.)

Q. Have you looked at all of them?

A. I have.

Q. Were you present when each one of those orders was signed?

A. I was.

Q. And in each instance was the person who signed those orders a Justice of the Supreme Court of New York State?

A. He was.

Mr. Monaghan: I offer these in evidence, your Honor.

Mr. Barshay: May we see them, Mr. Monaghan?

The Court: To save time, the recitals are not admitted. The orders are admitted.

So that there will be no delay, note an objection by all counsel, and give them each an exception. You will have an opportunity to read them later if you want to.

Mr. Monaghan: Your Honor, in each instance may I offer in evidence solely the directory part of the order, of which I have a photostatic copy?

The Court: Yes.

Mr. Barshay: Will your Honor permit the record to show an objection on the ground that the affidavits upon which these orders were granted are insufficient as a matter of law, and are hearsay.

[fol. 540] Mr. Lowenberg: I register the same objection, Judge, in behalf of Stemmer.

Mr. Segal: May it also be considered in regard to the defendant Krakower?

The Court: Yes.

Mr. Segal: Exception.

Mr. Lowenberg: Exception.

Mr. Barshay: Exception.

The Court: Since the recitals are not in evidence, they will subsequently be marked for identification. They can be supplied later. They will be marked Exhibits 2-A, 3-A, and 4-A. Proceed with your examination.

(Photostats of parts of People's Exhibits 2, 3, and 4, for identification, marked in evidence.)

Q. Officer Jove, under the authority granted by these orders, did you make installations for the interception of communication over these telephones?

A. I did.

Q. Before you made those installations, will you tell us what previous education, instruction and experience you have had in the making of such installations?

A. I have attended Police Academy of the City of New York, and I had received instructions as to how — intercept communications over the telephone, how to make the connections on the particular wires that are to be intercepted.

Also, I have received instructions as to the manual use of the particular tapping machine and listening devices. I also have been in company with patrolmen who had experience, previous experience in this type of work, and I had [fol. 541] accompanied these patrolmen in making such in-

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stallations. I also have been alone and made installations in several cases by myself.

Q. How many times before you made the installations pursuant to these court orders did you make similar installations for the interception of telephone communications?

A. I would say about twenty times.

Q. On what date did you make the first installation pursuant to the court orders which are now in evidence?

A. December 3, 1946.

Q. Will you tell the Court and jury just what you did in order to make the installations?

A. I took the court orders to the Telephone Company, and the Legal Bureau of that Company, after receiving the order, supplied me with information regarding the particular telephone as Circle 5-8020. They gave me the location of the service box and also the pair number. After I had received this information, I went to the location indicated by the Telephone Company, I made connections with the wires in this service box, and I connected the tapping machine to those wires, and also the listening devices. I then made a check.

Q. How do you mean, a check?

A. With a dial phone I clipped two wires and I dialed the operator and I asked the operator for a check on 8020, which she gave me. Then I proceeded to listen to the conversations that came over that wire.

Q. Did you thereafter, after the installation of that interceptor on Circle 5-8020 on December 3rd, did you proceed to intercept telephonic communications?

A. Not on that date.

[fol. 542] Q. When did you first start?

A. The first time was December 5, 1946.

Q. Did you make installations in the same way for the interception of telephone communications pursuant to the authority granted you by the second and third orders, which are People's Exhibits 3 and 4, in evidence?

A. I did.

Q. On what date did you make those installations?

A. On December 10th, 1946.

Q. December 10th, is that right?

A. That's right.

Q. Thereafter——

Mr. Lowenberg: What number was that, please?

Mr. Monaghan: Circle 5,—8020.

Q. Thereafter did you intercept various communications over these two additional intercepted wires?

A. I did.

Q. What wires were these, what were the numbers of the wires that you intercepted over?

A. Circle 5-5155; Circle 5-7366.

Q. Now, will you please tell the Court and jury how you intercepted the calls, or rather, how your installation operated?

A. After the machines are connected with the particular wires to be intercepted, when these particular telephones are going to be used, the hand-piece is picked up, the machine makes some kind of a click, is that outgoing or incoming?

A. That would be outgoing.

Q. Yes?

A. As the dial starts to operate the paper tape starts to function and dots in ink appear on this paper tape. At that time, as I hear the click, I will take the ear-phone and start to listen in on the conversation as it comes in.

[fol. 543] Q. The ear-phone is the type that you put over your head?

A. I have an ear-phone that I can rest on my head and to the side of my ear.

Q. After you made the two additional installations on December 10th on the numbers which you have just described, how were you able to identify, as you intercepted the telephone call, on which line it was coming in or going out?

A. I had each earphone marked with the corresponding telephone number on which each line was connected.

Q. Between December 3rd and December 15, 1946, did you intercept every telephonic message that went over those three wires?

A. I did not.

Q. Will you explain that, tell us which ones you did, and how long you were at the place where you were intercepting it?

A. I only intercepted those messages that went over this line during the time that I had the tap on and I was listening to these messages.

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Q. You were not there 24 hours a day?

A. I was not.

Q. And were there times during the daytime when you were on duty that you would leave the machine?

A. I did.

Q. The interceptor?

A. Yes.

Q. There were times when you went out to dinner.

Mr. Lowenberg: I object to all this, Judge.

The Court: Overruled.

Mr. Lowenberg: Exception.

The Witness: Yes.

Q. In other words, you were not there at all hours of the day or night?

A. I was not.

[fol. 544] Q. And what time would you start, do you recall what time you started in the morning?

A. I recall I started after noon-time.

Q. After noon-time?

A. Yes.

Q. Did the recording tape function to record the telephone number of each outgoing call from a tapped wire?

A. Not perfectly on every call, no.

Q. Not perfectly. Now, as you intercepted these telephone conversations did you make any notes?

A. I did.

Q. Have you them with you?

A. I have.

Mr. Monaghan: May I mark them for identification?

(85 pages of notes, consisting of 34 pages of yellow paper, and 51 pages of white paper were marked People's Exhibit 5, for identification.)

Q. Those are your original notes?

A. They are.

Q. Which you took at the time you were listening and making notes, is that right?

A. That's right.

Q. I wish you would explain a little more in detail to the Court and jury just how you made those notes?

A. As the conversations started on these telephones I started to write, I continued writing until after the conversation was stopped and I wrote what conversation remained in my mind that had transpired during the conversation.

Mr. Lowenberg: May we hear that?
The Court: Read the answer.

[fol. 545] (Stenographer repeated the last answer.)

Q. Now, these notes that you made, were they made right at the time that you were listening?
A. Made right at the time.
Q. Do you purport, or do those notes, rather, purport to be every word that was said in the course of the telephone conversation?
A. No.
Q. Will you tell the Court and jury just what they are?
A. They are part of the conversation transcribed on this paper, is the very words that were said, over said telephone, during the conversations. Other parts of this conversation is the substance as I retained in my mind after the conversation had concluded.

Q. I see, and were those notes made by you in the performance of your official duty in the regular course of your work as a police officer?
A. They were.

Q. And was it the regular course of your duties to make such notes during the performance of the duties you have described?
A. It was.

Q. Do you have any present independent recollection of all the details of the conversations you intercepted?
A. I have not.

Q. Do you know the defendant Krakower?
A. I do.

Q. Have you had any conversations with him?
A. I have.

Q. During those conversations with the defendant Krakower did you listen to his voice?
A. I did.

[fol. 546] Q. Are you able to tell us whether you heard his voice during your interception of any of the telephone

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conversations you have reported in your notes, in People's Exhibit 5, for identification?

A. I am.

Q. Have you indicated on your notes the conversations to which the defendant Krakower was a party?

A. I have.

Q. How did you indicate that?

A. By the name of Pete.

Q. By the name Pete?

A. That's right.

Q. Now, do you know the defendant Stemmer?

A. I do.

Q. Have you had any conversations with him?

A. I had.

Q. During those conversations did you listen to his voice?

A. I did.

Mr. Lowenberg: Pardon me, Judge, may we have the date set?

The Court: You may do that on cross-examination.

Mr. Lowenberg: All right, Judge, thanks.

Q. Are you able to tell us whether you heard his voice during your interception of any of the telephone conversations you have recorded in your notes, People's Exhibit 5, for identification?

A. I did.

Q. Have you indicated on your notes those conversations to which Stemmer was a party?

A. I have.

Q. How have you indicated that?

A. The name Harvey.

Q. Do you know the defendant Zarowitz?

A. I do.

[fol. 547] Q. Have you had any conversations with him?

A. I have.

Q. Tell us when and where and what those conversations were—well, no,—during those conversations did you listen to Zarowitz's voice?

A. I did.

Mr. Barshay: I object to that, it is a conclusion. He has not laid a proper foundation as yet, and I ask your Honor to permit me on a preliminary voir dire to question him whether or not he can identify the voice.

The Court: Before any conversations intercepted can be testified to with respect to each defendant, each counsel will have an opportunity to examine the witness.

Mr. Barshay: All right.

Q. Are you able to tell us whether you heard his voice during your interception of any of the telephone conversations you have reported in your notes, in People's Exhibit 5, for identification?

A. I did.

Q. How did you indicate his voice, his conversation?

A. By the name of Jerry.

Q. Do you know Alvin Paris?

A. I do.

Q. Have you had any conversations with him?

A. I have.

Q. During those conversations did you listen to his voice?

A. I did.

Q. Are you able to tell us whether you heard his voice during your interception of any of the telephone conversations you have reported in your notes?

A. I am.

Q. People's Exhibit 5, for identification?

A. I am.

[fol. 548] Q. Have you indicated on your notes those conversations to which Alvin Paris was a party?

A. I have.

Q. Have you so indicated?

A. I have.

Q. How?

A. By the name Al.

Mr. Monaghan: Now, I am going to ask him with respect to a certain telephone conversation, or conversations. You said you would give——

Mr. Lowenberg: May we have a preliminary examination?

The Court: Just a minute, are these conversations arranged chronologically, or by the names of the defendants, the testimony that you are going to offer?

Mr. Monaghan: It is chronologically.

The Court: All right, you may each examine.

Mr. Lowenberg: All right, Judge, thanks.

Mr. Barshay: May I first interpose a preliminary objection to it? Your Honor, I am mindful of the Court of Appeals decision, nevertheless, I object to the introduction of

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any wire-tapping evidence on the ground it violates Section 605 of the Federal Communications Act of 1934.

The Court: I have held, and hold again, that that Federal Communications Act is not applicable in State actions.

Mr. Barshay: I respectfully except. I now have a special ground upon which to object. I object to the introduction of any wire-tapping evidence which involved interceptions and divulging of information from the State of New York to the State of New Jersey.

[fol. 549] The Court: The objection is overruled.

Mr. Barshay: Exception, sir.

Mr. Lowenberg: May I note the same objection?

The Court: Yes, overruled.

Mr. Segal: I note the same objection for the defendant Krakower as well.

The Court: The objection is overruled.

Mr. Segal: Exception.

Voir Dire examination.

By Mr. Lowenberg:

Q. Now, Officer Jove, where were you born?

A. I was born in Porto Rico.

Q. Porto Rico?

A. Yes.

Q. And how long have you been——

The Court: Mr. Lowenberg, only with respect to the identification of the voice at this time, do not usurp the District Attorney's function of examining this witness with respect to this testimony.

Mr. Lowenberg: All right.

Q. Officer, during what period of time did you make these interceptions, did you say?

A. From December 5, 1946, until December 14, 1946.

Q. And when did you speak to the defendant Stemmer?

A. January 21, 1947.

Q. In other words, there was a lapse of approximately five weeks between the time of the last telephone conversation, the time that you spoke to the defendant Stemmer, is that correct?

A. That's right.

Q. And you spoke to the defendant Stemmer in person, correct?

A. Yes.

Q. And how long did you hear the defendant Stemmer [fol. 550] talk in person?

A. For the period of about forty-five minutes or an hour.

Q. And isn't it a fact, Officer, that a person's voice on the telephone is usually different than a person's voice in speaking face to face?

A. Yes.

Q. And how many people would you say you have spoken to between December 15th and January 21st?

A. Quite a number.

Q. How many?

A. Oh, in the hundreds, I guess.

Q. Hundreds?

A. Yes.

Q. Have you intercepted any other telephone conversations between December 15th and January 21st?

A. No.

Q. How long have you been doing this work for the Police Department, intercepting telephone conversations?

A. For about eight years.

Q. Eight years?

A. Yes.

Q. Did you ever, Officer Jove, when you testified—withdrawn at this time.

Whenever you were called on to testify in these eight years during a trial, did you ever say that the voice that you heard on the telephone was not the voice of the accused?

A. No, I never did say so.

Q. Never did?

A. No.

Q. So in all these cases where there was a trial held you always said that the voice of the defendant was the voice that you heard?

A. I did.

Q. That is correct, isn't it?

A. Yes.

Q. Is there anything peculiar about Stemmer's voice?

A. Yes.

[fol. 551] Q. What?

A. He has got a rough voice, and he has got a slight lisp in his voice.

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Q. Did you hear other people having a lisp?
A. Not his type.
Q. What kind of a type of a lisp has he got?
A. A lisp that is not as steadily as he conversed.
Q. Sort of steadily?
A. It is not steadily.
Q. Did you hear other people who had that lisp?

(The Stenographer reads the previous answer to Mr. Lowenberg, as follows:
"It is not steadily.")

Mr. Lowenberg: Not steadily.

Q. Did you meet other people who had that steady lisp?
A. It is not a steady lisp.
Q. Did you hear other people who had the same degree?
A. No.
Q. You mean out of the seven million people in the City of New York, he is not the only one who has got a steady lisp?
A. I wouldn't say that.
Q. You wouldn't say that?
A. No.
Q. So you would say there are other people who have the same unsteady lisp?
A. It might be.

Mr. Lowenberg: (Repeating) It might be.

Q. Now, is it on that basis that you identify his voice?
A. No.
Q. Is there anything else?
A. Yes.
Q. (Continuing) Upon which you would predicate the identification of that voice?
A. Yes.
[fol. 552] Q. What?
A. The regular sound of his voice.
Q. The regular sound of his voice?
A. That's right.
Q. And the sound of the telephone is different than the sound in person, isn't it?
A. In a way it is, yes.
Q. It is, so that if you hear me now speaking in this courtroom, and heard me on the telephone, you would not be able to say now, Officer Jove, that it was I talking, would you?
A. I may.

Q. You may, but you are not sure of it.

A. I may.

Q. I say, but you couldn't swear that you could.

A. Maybe I could swear.

Q. You mean that you would swear that, after hearing me in person in this courtroom, that if I went to a telephone, you would swear that I was the person talking, is that what you mean?

Mr. Monaghan: Just a moment, I object to that question.

The Court: If you speak as loudly as that, I would swear to it.

Mr. Lowenberg: Pardon me, what is that?

The Court: Lower your voice a bit.

Mr. Lowenberg: Well, I will. I will moderate my voice, your Honor.

Mr. Monaghan: I object.

Mr. Lowenberg: I press the question.

The Court: I will allow it.

Q. Would you then swear that it was I talking?

[fol. 553] Mr. Monaghan: I object, if your Honor please. How could he know unless he has heard it?

The Court: Well, he may answer, as best he can.

A. I may swear.

Q. Well, I will ask you for an answer, Officer, yes or no, would you——

Mr. Monaghan: (Interrupting) I object.

Mr. Lowenberg: He said he might.

The Court: Just a minute.

Mr. Lowenberg: I am sorry.

The Court: If the question can be answered yes, or no, he can answer yes or no. If he can't answer yes or no, he should say no.

Q. In other words, Officer, am I safe in saying that you would not, or you would not tell the jury now, that you would swear definitely that it was my voice?

A. I won't say that.

Q. You wouldn't say that?

A. No, sir.

Mr. Lowenberg: That's it.

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Q. Now, the only reason you are saying it in this case, though, is because, as you did in other cases, you want to identify the voice of the defendant?

A. No.

Q. Well, in no other case when you went to trial did you ever say it was not the voice of the defendant?

A. In every case I was positive.

Q. You were positive——

The Court: Now, remember, this is a preliminary examination.

Mr. Lowenberg: I understand.

[fol. 554] The Court: A *voir dire* of the witness. We have two such preliminary examinations before this testimony is offered, and I want to finish with this witness tonight.

Mr. Lowenberg: I understand, and I have just two or three more questions.

Q. Did you ever have any course in the identification of voice?

A. I do not.

Q. You are just a mechanic that sets up the installation for interception of telephone conversations, aren't you?

A. Yes, that's part of my job.

Q. I say, you are just a mechanic in doing that, aren't you?

A. I am not.

Q. You didn't take any course for the identification of one's voice, did you?

A. No.

Q. You didn't have any training of any kind for the identification of anybody's voice, did you?

A. No.

Q. All you do is as a mechanic, is to set up the installation, put the earphones on and try to identify a person's voice, is that correct?

A. No.

Q. Is there anything else you do?

A. Yes.

Q. What?

A. I pay particular attention to the voices that I hear.

Q. That is what I say, you pay particular attention, but you didn't have particular training in the identification of a voice, or no training, did you?

A. I have training.

Q. You have training?
A. Yes.
Q. You got that from listening to people talk?
A. Yes.
Q. Is that correct?
A. Right.
[fol. 555] Q. Did you ever make a mistake in your life?
A. Yes.
Q. As to the identification of a voice?
A. No.
Q. You mean at no time in your life did you ever make a mistake in hearing a person talk?
A. (No answer.)
Q. Right?
A. I don't understand what you mean.
Q. Did you ever get on a telephone, for example, you yourself, and somebody called you, and did you ever mistake a voice?
A. Possible, yes.
Q. Yes, you have done that, haven't you?
A. Possible.
Q. You thought it was somebody else talking, and the person corrected you, is that right?
A. In a kidding manner, yes.
Q. What?
A. They were kidding me.
Q. Kidding you?
A. Yes.
Q. But aside from kidding you, in whole life, you never made a mistake on the telephone?
A. As far as my police work, no.
Q. Well, now, you carry your police work into your private life, too, don't you?
A. No, I do not.
Q. You don't—well, when somebody calls you on the telephone privately, you know who it is immediately, do you?
A. I do not.
Q. You make a mistake.
A. I don't make any mistake.
Q. You never make any mistake?
A. Well, I am not trying to identify his voice, then.

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Q. So when you put the earphones on, you are—is that correct?

A. Absolutely.

Q. Now, to come back to just my final question:

[fol. 556] Isn't it safe for me to say then, that all you are is a mechanic?

A. It is not.

Q. You took no course, no training in voice identification?

Mr. Monaghan: I object to that.

The Court: We have two more such examinations, and that is all you are going into.

Mr. Lowenberg: I am sorry.

Q. How many people would you say you have spoken to from December 15th to January 21st?

A. I don't know exactly, but quite a number.

Q. Approximately——

A. (No answer.)

Q. A hundred?

A. Possible.

Q. Pardon me?

A. About a hundred.

Q. About a hundred?

A. Yes.

Q. How many have you spoken to on the telephone from December 15th to January 21st?

A. About fifty or more, or a hundred—I don't know.

Q. About a hundred?

A. Possible.

Q. And the voice is different in person than it is from the phone?

A. In a way it is.

Mr. Lowenberg: That's all.

The Court: Now, Mr. Segal.

Examination on the Voir Dire.

By Mr. Segal:

Q. Now, Mr. Jove, when you first undertook to intercept the wire, one of these three numbers that you have mentioned, you had a basis on December 5th, for intercepting those wires, didn't you—you had some idea, didn't you?

A. I did.

Q. Now, up to that time you had never talked to Krakauer?

A. No.

[fol. 557] Q. So that when these voices came in, or when these voices went out, and other people picked up receivers at the other end wherever the dial responded, you had no original basis to compare the outside voice with, did you?

A. No.

Q. And all that you can say now is that whatever voice you heard on the outside has something queer about it that fastened itself in your mind, is that right?

A. That's right.

Q. Now, on December 5th—you say you started on December 3rd, didn't you?

A. I started to listen on December 5th.

Mr. Segal: December 5th.

Q. I think you said some place, December 3rd, about something or other.

A. Made the installation.

Q. You made the installation on the third?

A. That's right.

Q. Then you had some idea or notion before December 3rd, because your order didn't come through until December 3rd, and you had to get the order put through a few days before that, is that right?

A. I had the order on the second.

Q. On the second, and you had information leading you to go there, perhaps, on the 1st, or the 30th of November, is that right?

A. That's right.

Q. So that by the 30th of November being a Saturday, it would not be possible that that was the time you had the information, would it?

A. It was before that.

Q. Before that? Would it have been around a week preceding November 30th?

A. Friday before the Saturday, the 29th.

[fol. 558] Q. Now, you were asked a while ago whether you had studied voice? Have you?

A. I have not.

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Q. Have you ever studied—have you ever gone to a school where you were taught something about phonetics?

A. No.

Q. Have you studied phonetics since you became one of the interceptors?

A. No.

Q. Do you know anything about the pitch in a voice?

A. Only in my routine.

Q. You only know your routine, is that it?

A. My own.

Q. But have you ever studied something about resonance or pitch?

A. I have not.

Q. Or rhythm, in a voice?

A. No.

Q. Have you ever heard that in phonetics to identify voices, that it might be necessary to use something in connection with rhythm or pitch or resonance?

A. I heard that.

Q. But you didn't acquaint yourself with that feature?

A. I didn't study scientifically, no.

Q. So that when you learned that from the wires leaving from Alvin Paris's at 56 West 56th Street, you learned that he dialed certain numbers, you merely would hear the responding voice, and you would try to get the number which he was calling, is that right?

A. I had the number which he was called.

Q. That reflected itself on the dial, on that piece of paper, as the dial turned as he or whoever it was would make the call, it reflected itself on this piece of paper which told you what number was being called?

A. That's right.

Q. Is that right?

A. That's right.

Q. In other words, the various turns as a person describes, [fol. 559] turns the dials around, on a piece of paper that you have in your laboratory or wherever it is you are listening, you see the certain lines that stop, and therefore you know whether one number is called or the other—is that right?

A. That's correct.

Q. Now, of course, you have means of ascertaining who it is that owns or in whose name that telephone is listed, don't you?

A. Yes.

Q. And you, as a practice, go to the telephone people and see in whose name is this telephone listed?

A. Yes.

Q. In that way you would know that when a Jerome number was called, you would learn that a certain person named Krakower was the person for whom such a number was installed, is that right?

A. Yes, I would know that if I called the phone company.

Q. Now, the only thing you would know, therefore, would be that certain numbers would be sent out from Mr. Paris's apartment to a particular Jerome number, let us say, and you would hear somebody at the other end answering—is that right?

A. That's right.

Q. And then you say that you would record in your own way as much as you could of what was said, and then later on fill in what you thought was said?

A. No.

Q. Is that right?

A. That is not right.

Q. Well, did you say that you would put in the words that you would catch, as far as was humanly possible for you to do—is that right?

A. That's right.

Q. But you say that there were occasions when you didn't [fol. 560] get everything, and therefore you would fill in some of the things, is that right?

A. That is not right.

Q. You would fill in what you thought was right?

A. That is not right.

Q. Well, what is right?

A. What I retained in my mind, that was actually said.

Q. What you retained in your mind, what was said?

A. What I retained in my mind, what was actually said.

Q. Now, speaking of this voice, when this Jerome number was called, when you learned that a certain Jerome number was called, did you immediately that very day, that very hour, find out who that person was?

A. I did not.

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Q. Did you do it the next day?
A. I did not.
Q. When did you do it?
A. That was done Saturday afternoon, through my office.
Q. Saturday afternoon?
A. That's right.
Q. You mean, each Saturday you would do it?
A. No; Saturday, December the 14th, 1946.
Q. That was the first time?
A. I believe so.
Q. That you——
A. (Interrupting:) I didn't do it.
Q. You didn't do it?
A. No.
Q. But you believe it was December 14th, for the first time?
A. That's right.
Q. Is that right?
A. Yes.
Q. Now, you had heard a voice at the other end of the Jerome number answering, didn't you?
A. I did.
Q. Can you say it was always the same voice that answered?
A. No, not always.
Q. Not always?
A. No.
Q. Can you say on occasion there were male voices that were different?
A. The only male voice was a child's voice.
[fol. 561] Q. About how old would you say the child's voice was?
A. I don't know.
Q. Very young?
A. I don't know. Yes, young.
Q. A boy's voice—a male's voice, you say?
A. A young voice.
Q. Five or six?
A. I don't know the age.
Q. Well, about, was it very young, a tender age?
A. No, it wasn't five or six. It was older than that.
Q. How much older?
A. I don't know.

Q. A man, sort of an adolescent?
A. I don't know how old it would be.
Q. You would say it was an adolescent?
A. The conversation this person had was very short.
Q. Is it because of the conversation, or because of the type of voice that makes you say that?
A. The type of voice was young and the conversation was short.
Q. You can't say now whether it was adolescent, or very young?
A. (No answer.)
Q. Or whether it was a real man's voice?
A. It was not adolescent—I mean it was not very young. He was an older person. It wasn't five or six.
Q. It wasn't five or six?
A. No.
Q. Possibly ten or eleven.
A. It might have been.
Q. Might have been?
A. That's right.
Q. The voice hadn't changed, yet, had it?
A. What voice?
Q. I mean the male voice hadn't, not yet changed—is that what you mean?
A. (No answer.)
Q. You know the age at which the voice changes in a boy?
A. Well, I wouldn't be able to answer that, no.
[fol. 562] Q. And you can't say whether it was the voice of a young boy, between ten and twelve, can you?
A. It was a young boy, yes.
Q. Now, what was there about the voice that you heard at the other end that would make you remember that?

The Court: Which voice?
Mr. Segal: I am speaking of the Jerome number, the Krakauer number.
Mr. Monaghan: You mentioned several on that.
Mr. Segal: All right.

Q. You were asked whether you talked to Krakauer?
A. Yes.
Q. I think you said yes.
A. Yes.
Q. You said you never talked to him before you started listening to the telephones that Paris was making?

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A. No.

Q. So I assume it was after December 14th or 15th that you spoke to Krakauer?

A. No.

Q. Was it after December 14th?

A. Yes.

A. Was it after December 15th?

A. No.

Q. Was it December 15th?

A. Yes.

Q. At that time Krakauer came down to the 54th Street Police Station, is that right?

A. I saw him there.

Q. And at that time he spoke to you, and you spoke to him?

A. That's right.

Q. That's the first time you ever talked to him?

A. That's right.

Q. Is that correct?

A. Right.

Q. Now, prior to that time, would you say——

Mr. Segal: I withdraw that.

[fol. 563] Q. How many times did you hear that voice, Krakauer's voice before you saw him?

A. Nine times.

Mr. Segal: Nine times.

Q. May I assume therefore, that on nine occasions you recorded in your way what was said?

A. (No answer.)

Q. By him?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, what was there about Krakauer's voice before you met him that fixed itself in your mind?

A. Will you repeat that, please?

Q. What was there about his voice that fixed itself in your mind, that made you remember, before you met him?

A. It was a strong voice, gruff, and it was the only voice of the type that always answered the phone on that Jerome number.

Q. Now, is that the reason you would say, because it was the only voice of that type that always answered the Jerome number that you remembered it?

A. That's not the only reason, no.

Q. Is there anything else about the voice, is there a lisp in his voice?

A. There was not.

Q. Was there anything else about the voice other than the fact it was a strong voice and always answered?

A. A strong, gruff voice, that's all.

Q. That's all you can say about it?

A. That's right.

Q. Was it an up and down voice?

A. I don't know if an up and down voice. It was a steady voice.

[fol. 564] Q. Was it a voice that used to sort of sing?

A. No.

Q. Was it a voice that you can say had resonance in it?

A. A steady, strong voice.

Q. A steady, strong voice—that is your description.

A. That is it.

Q. That is as far as you will go?

A. That's right.

Q. And then when you saw him on the morning of, you say, December 15th, how long did you speak to him?

A. About forty-five minutes or an hour.

Q. Well, you didn't talk to him, did you?

A. Oh, yes, I spoke to him.

Q. You mean you heard him talking and you spoke to him for a while.

A. That's right.

Q. Your talk with him was a few minutes, is that right?

A. A few minutes.

Q. But you were there while he was talking?

A. That's right.

Q. And then he went home, is that right?

A. That's right.

Q. And at that time, by that time, it had fixed itself in your mind, "that's the voice I heard," is that right?

A. That's right.

Q. You are certain of that?

A. Yes.

Q. Did you at that time say to Mr. Monaghan, "That's a voice that I heard"?

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A. No.

Q. Did you at that time say to Inspector O'Brien, "That's a voice I heard"?

A. No.

Examination on Voir Dire.

By Mr. Barshay:

Q. Mr. Jove, you speak with a distinct foreign accent?

A. Yes.

Q. Did you ever listen to the radio?

A. Yes.

[fol. 565] Q. Do you know what the word mimic is, m-i-m-i-c?

A. Yes.

Q. A person who imitates another?

A. Yes.

Q. Did you ever hear over the radio a mimic imitating the voice of Churchill, Roosevelt, Al Smith or any of the other famous men?

A. Yes.

Q. They are so much alike you thought they were Roosevelt, Smith or Churchill actually speaking; isn't that so?

A. Yes.

Q. And that goes for some people who imitate the voice of singers, like Frank Sinatra, Perry Colmar, Kate Smith, and so forth?

A. Yes.

Q. And you heard George Jessel imitate Cantor, and Cantor imitate Georgie Price?

A. Yes.

Q. You know that, don't you?

A. Yes.

Q. You couldn't tell one apart from the other character?

A. That's right.

Q. Now, you have already said that on the telephone a person may sound differently than face to face. Is that so?

A. Yes.

Q. When you listened on the telephone when you were assigned, you heard many voices during the time that you were there; correct?

A. That's right.

Q. The telephone rang like mad?

A. No.

Q. Well, there were a great many different people speaking about a great many different subjects?

A. Only the last two days.

Q. Did you store in the memory of your ear the voice of each person whom you heard speak over those telephones, incoming and outgoing?

A. Not of everyone, no.

Q. So that you couldn't identify the voice of everyone who spoke on that telephone, could you?

A. No, I could not.

[fol. 566] Q. And that would be impossible; correct?

A. Sure.

Q. And whether or not any voice stuck in the memory of your ear would depend upon the number of times you heard that voice?

A. Partly, yes.

Q. The fewer times you heard it, the less likely it would stick in your mind?

A. Not necessarily.

Q. Well, the name of the person would stick in your mind, wouldn't it?

A. Not necessarily.

Q. The subject matter would stick in your mind?

A. Yes.

Q. But the voice would not?

A. Not of all the persons.

Q. Now, you did not hear the name Zarowitz, did you, on the telephone?

A. I did not.

Q. You only heard a first name, Jerry?

A. That's right.

Q. Did you hear a name Murray?

A. No.

Q. You did not hear the name of Murray Rothenberg in the Jersey office, Red Murray Rothenberg, on the telephone?

A. No.

Q. You never heard the name Murray on that wire at all?

A. No.

Q. Could you mistake Jerry for Murray?

A. No.

Q. If quickly said on the telephone, you could, couldn't you?

A. I don't think so.

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Q. If a person did not speak distinctly, you might mistake Murray for Jerry?

A. If he says Jerry for Murray, I may.

Q. I say, if a person spoke quickly and did not pronounce his words directly, or the inflection of his voice was such that one person might say Murray in a fashion that would [fol. 567] sound like Jerry, that could be, couldn't it?

A. If he doesn't pronounce the name, you don't know what he is pronouncing.

Q. And you might make a mistake. It is possible, is it not?

A. I would just leave it at that.

Q. Did you know that at the Jersey office which was being spoken to from Paris' office, there was a Red Murray and there was a Red Jerry?

A. No, I don't know.

Q. You don't know that at all?

A. No.

Q. Now, you heard, according to my available information, about two or three taps wherein the name Jerry was used?

A. That's right.

Q. But no Zarowitz?

A. That's right.

Q. So that on the 15th of December, when this case broke and the taps on your part had ended, you had heard the name Jerry and the voice of Jerry about two or three times?

A. Five times.

Q. What?

A. Five times.

Q. Five times altogether. There were a great many people who spoke on the wire during those few days; is that so?

A. That's right.

Q. You didn't know who it was?

A. I did not.

Q. When the case broke and Mr. Paris made a confession, and for the first time when he did speak he mentioned in his confession the name Jerry?

A. That's right.

Q. You learned that, didn't you?

A. I knew that.

Q. You knew that?

A. Yes.

Q. But you still did not have the second name of that person?

A. I did not.

Q. Then you went back to the flower shop, or somebody did, and brought you the second name of Jerry, is that correct, and the name Zarowitz was first learned; is that so?

[fol. 568] A. I don't know where I got the name, but eventually I learned the name Zarowitz.

Q. So that on December 18th, the day that Mr. Zarowitz was detained as a material witness in the Paris case, you had known the name Zarowitz to be the second name of Jerry?

A. That's right.

Q. And then you found out the address of that person?

A. That's right.

Q. And Paris, having said that Jerry is Jerry Zarowitz, by that time you went to the home of Jerry Zarowitz?

A. That's right.

Q. And you knew exactly whom you were going to see?

A. Yes.

Q. And you went for a specific purpose, didn't you?

A. Yes.

Q. You knew at that time from the discussion in the case that even if Paris spoke, unless the voice of Zarowitz was identified, you would have no case against him? You knew that, didn't you?

A. I did not.

Q. You knew Paris was an accomplice, did you not, sir?

A. Yes.

Q. You knew that an accomplice's testimony would have to be corroborated, didn't you?

The Court: We are not interested in that.

Mr. Barshay: Just on the question of credibility, sir, that he could have a specific purpose, knowing the state of facts that he had to get. That is the only purpose, sir.

The Court: Go ahead.

[fol. 569] Mr. Monaghan: I think it is improper at this time, your Honor. I object to it.

Mr. Barshay: If it is, I will skip it now.

The Court: Go ahead.

Q. You did not call Mr. Zarowitz on the telephone at his home, did you?

A. I did not.

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Q. You did not make an effort to determine by calling the home of Zarowitz, whose name and address you now had, whether or not the voice you claim you heard three days before was the same voice on the telephone who had answered Zarowitz's number; you made no such effort at all?

A. I did not.

Q. And you never to this very second spoke to Zarowitz again on the telephone?

A. No, I haven't.

Q. Up to this minute; right?

A. That's right.

Q. So you and your brother officers went up to his room and you waited for him to come out?

A. Yes.

Q. First some other officers came over and spoke to him, not you?

A. That's right.

Q. You concealed the fact that you were an officer for a little while, didn't you?

A. Absolutely not.

Q. From the very first moment?

A. I did not.

Q. Don't be frightened, sir. You did not?

A. I did not.

Q. That is what I am going to contend, that you did not. So you went over to Mr. Zarowitz and you said you were a police officer?

A. No, I didn't say that.

Q. How did you identify yourself to Mr. Zarowitz?

A. Mr. Zarowitz was already with a police officer, so I [fol. 570] approached him and said, "Hello." I took it for granted he knew I was a police officer, but I didn't tell him I was a police officer.

Q. You did not conceal that fact?

A. No.

Q. And being in custody of a police officer led you to the conclusion that he would know you were a police officer?

A. Yes.

Q. Then you engaged him in conversation?

A. That's right.

Q. He did not refuse to talk to you, did he?

A. No.

Q. As a matter of fact, you didn't talk to him about police business, did you?

A. That's right.

Q. You just wanted to see whether the voice was the same?

A. Yes.

Q. You knew now it was Jerry, you knew it was Jerry Zarowitz; you knew that Paris had said something about him; you never called him on the telephone and talked to him to hear his voice, but you said, "Didn't I see you at the race track?"

A. It is possible, yes.

Q. And all he said was "No"; isn't that so?

A. That is right.

Q. That is all you heard of his voice then?

A. No, I heard a lot more.

Q. Just wait a minute. Then didn't you say to him, "Where is the nearest post office?" and then didn't he say, "Two blocks north"?

A. No, I didn't ask him that.

Q. Did someone else ask him that?

A. I don't know; I don't think so.

Q. Isn't that all the talk you ever had with Jerry Zarowitz then?

A. Absolutely not; I had more.

Q. Did you then tell Mr. Monaghan, after Mr. Zarowitz was detained, that you recognized the voice of Mr. Zarowitz [fol. 571] as the one over the telephone that you overheard?

A. After that, yes.

Q. After an oral conversation with him; is that correct?

A. Yes, that's right.

Q. You told that to him for sure now?

A. Yes.

Q. What time of the day did you tell it to him?

A. I told him some time after December 18th.

Q. What time, sir?

A. I don't remember.

Q. But it was before he was booked as a material witness, in the afternoon of that day?

A. No, it was after that.

Q. Now, you spoke to him at 10 in the morning?

A. That's right.

Q. And he was detained as a material witness——

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Mr. Barshay: May we have a time, Mr. Monaghan? Late in the afternoon, wasn't it?

Mr. Monaghan: Yes, about 5:30.

Mr. Barshay: About 5:30 or 6 o'clock I came to court.

Q. Between the morning, when you accomplished, as you claim, your mission to hear again the voice of Zarowitz, and the time of his being detained that same day as a material witness, didn't you report the success of your mission to Mr. Monaghan?

A. I did not.

Q. Did you report it to your superior?

A. Yes.

Q. So that at least your superior knew it?

A. Yes.

Q. Who was your superior?

A. Lieutenant McGurr.

Q. The same man who made the affidavit confining Zaro- [fol. 572] witz as a material witness, or one of the men; is that so?

A. I don't know.

Q. And after communicating that opinion about the voice you heard on the telephone having the alleged conversations with Paris about fixing a game, Mr. Zarowitz was not placed under arrest, to your knowledge, for this crime, was he?

A. I know he was not placed under arrest.

Mr. Barshay: That is all.

Mr. Segal: May I ask one more question, Judge?

The Court: Yes.

By Mr. Segal:

Q. Did you tell anybody at all, any police official or any Assistant District Attorney on December 15th, when you saw Mr. Krakower at the West 54th Street police station, "That's the voice I heard on the telephone when the Jerome number was dialed"? Did you tell anyone of your officials that?

A. Yes.

Q. Which one?

A. Lieutenant McGurr.

Q. You are sure of that?

A. Yes.

Q. You told that to him that day?
A. That day.

By Mr. Monaghan:

Q. Did you have talks with Zarowitz other than what Mr. Barshay related here?
A. Yes.
Q. Much more?
A. Yes.
Q. How long were you talking with him?
A. About an hour.

Mr. Barshay: Your Honor, before any testimony is offered concerning these taps, I move to bar, that your Honor [fol. 573] bar any conversations with Zarowitz on the ground that no sufficient foundation has been laid.

The Court: I hold that the testimony that the voices were each identified with respect to these alleged interceptions is admissible, that a foundation has been laid, and the weight is for the jury, the probative force is for the jury.

Mr. Barshay: I respectfully except.

Mr. Lowenberg: May I respectfully object on behalf of the defendant Stemmer?

Mr. Segal: May I except on behalf of Krakower?

Mr. Barshay: It is quite clear, sir, that whether or not it is Zarowitz's voice is still for the jury to decide when the entire case is presented.

The Court: I am not deciding any question of fact, Mr. Barshay. That is for the jury. I hold a foundation has been laid, and the weight is for the jury.

Q. Subsequent to taking those notes, did you dictate those intercepted telephone communications to a stenographer?
A. I did.
Q. And thereafter did she transcribe your dictation?
A. She did.
Q. After the transcription had been made, did you personally compare the transcription with your original notes?
A. I did.
Q. Is this a transcription of your notes?
A. It is.
Q. And did you compare that personally with your original notes?

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A. I did.
Q. Is it a true and accurate copy?
A. It is.

[fol. 574] Mr. Monaghan: I offer it in evidence.
Mr. Barshay: I object to that.
Mr. Lowenberg: I object.
Mr. Segal: May he use the original notes, if your Honor please?
The Court: If counsel object, the original notes will be used.
Mr. Segal: May we therefore have the use of the extra copy?
Mr. Barshay: I object to the introduction of the original notes in evidence. I don't object to him using them to refresh his recollection, but I object to the introduction of any notes.
The Court: It has been held, Mr. Barshay, that if a witness made notes at the time of a particular occurrence, and he has no definite recollection of a particular event or occurrence, his original notes that he made himself can be offered in evidence. I could give you the citation, if you want it.
Mr. Barshay: I know the case. I respectfully except.
The Court: I will allow it. If there is objection, the original notes will be used.
Mr. Monaghan: Did you object?
Mr. Lowenberg: Yes. May we see it? Maybe we will withdraw the objection.
The Court: Have you copies for all?
Mr. Slonim: No, your Honor, unfortunately we did not have time to make them.
Mr. Monaghan: May I ask this question?

[fol. 575] By Mr. Monaghan:

Q. By looking at your original notes, do they refresh your recollection as to all the conversations without the use of your notes?
A. No.

The Court: Did you offer them?
Mr. Monaghan: I am offering these notes in evidence, your Honor. I am just going to offer particular conversations. I am not going to offer the entire——
The Court: What number is that?

Mr. Monaghan: Number 5 for identification.

The Court: Mark the first Exhibit 5-A in evidence.

Mr. Lowenberg: Judge, we have to insist on the original.

The Court: Sit down, gentlemen.

Mr. Monaghan: Your Honor, I offer in evidence the conversation of December 5, 1946, at 2:06 P. M.

Mr. Lowenberg: I will object to it, if your Honor please, upon the ground——

The Court: Are these the original notes?

Mr. Monaghan: The original notes.

The Court: Objection overruled.

Mr. Lowenberg: Exception.

(Original notes of Patrolman Jove of telephone tap at 2:06 P. M., December 6, 1946, received in evidence and marked People's Exhibit 5-A.)

By Mr. Monaghan:

Q. Now, officer, will you take Exhibit 5-A in evidence and read it to the Court and jury?

A. Any particular time?

[fol. 576] Q. At 2:06 P. M., you see where it is marked in evidence there.

A. Excuse me, yes.

Q. Keep your voice up so all the jurors can hear you.

A. "2:06 P. M., December the 5th, 1946." It was an incoming call. The inside voice, which I identified as the voice of Alvin Paris answers the telephone and said, "Jay May Manufacturing Company."

The outside voice which I now identify as that of the defendant Harvey Stemmer said, "Hello, Al., I can talk better to you today than last night, I am at least sober. I landed in Nicholas' place last night and was drunk enough to place a small bet on City College. Pete wanted to come over and see you."

Q. Pete, what?

A. "Pete wanted to come over to see you."

Q. "To see you"?

A. That's right. The inside voice, Alvin Paris, said——

Mr. Lowenberg: If your Honor please, I will object to this whole conversation upon the ground it is immaterial and irrelevant to the issues in this case.

Mr. Barshay: Completely foreign to it.

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Mr. Lowenberg: Completely foreign to the entire subject.

The Court: The objection is overruled.

Mr. Lowenberg: Exception.

The Witness: Alvin Paris: "I don't want to see him. I don't want to see too many. I told the boys if they win their game for sure Sunday I could have a nice bet on it for them. I told them I am not a gambler, just a sport. I showed them my business and proved to them I am a legitimate businessman."

[fol. 577] The defendant Harvey Stemmer said, "I will see you tonight."

Alvin Paris said, "Shall I come in the same way?"

The defendant Stemmer said, "Come to 26th Street and First Avenue, there is a gate at the diner, go right through there."

Mr. Lowenberg: Now, if your Honor pleases, I will object to that.

The Court: You what?

Mr. Lowenberg: I will object to that.

The Court: I will sustain the objection to that.

Mr. Lowenberg: Exception—may I move for a mistrial?

The Court: The motion is denied.

Mr. Lowenberg: Exception.

Mr. Monaghan: You sustained the objection to the balance of that?

The Court: Yes. Ladies and gentlemen of the jury, there is nothing in this conversation that in any way involves the defendant Stemmer except to the effect that he said he made a bet on City College and that Pete wanted to come over, that is all there is to that.

Mr. Lowenberg: May I except to your Honor's remarks at this time, if your Honor please?

The Court: You have an exception.

Mr. Lowenberg: To the effect that there is nothing in here which involves Stemmer except the two items which your Honor pointed out. May I again renew my motion for a mistrial?

[fol. 578] The Court: The motion is denied.

Mr. Lowenberg: Exception.

Mr. Segal: May I ask your Honor to charge the jury at this time, even at the expense of having it repeated again, that whatever is said by one person should not be binding

on the other defendants and where it is mentioned here that likewise it applies with the same rule——

The Court: I deny your application.

Mr. Segal: May I except, and may I ask your Honor to advise this jury that the name Pete does not make any particular, or ready reference, to the defendant in this case.

The Court: I deny your application.

Mr. Segal: I except.

Mr. Monaghan: Will you direct your attention to the telephone conversation intercepted by you on Friday, December 6, 1946, at 2:10 P. M.—I offer that in evidence, your Honor, as People's Exhibit 5-B.

Mr. Segal: The same objection.

Mr. Monaghan: This is a conversation commencing at 2:10 P. M. on December 6th, 2:10 P. M.

Mr. Lowenberg: May I at this time, Judge, register my objection to the reception of this wire tap in evidence on the ground that it is immaterial, incompetent and irrelevant and foreign to the issues in this case.

The Court: It is not clear what it refers to but I think we have sufficient testimony in this case with respect to association. I will sustain the objection.

[fol. 579] Mr. Monaghan: I direct your attention to the telephone conversation intercepted by you on Saturday, December 7, 1946, at 3:15 P. M.

Q. You have that?

A. Yes.

Mr. Monaghan: I offer it in evidence.

Mr. Lowenberg: I object to it as incompetent, irrelevant and foreign to the issues in this case.

The Court: Overruled.

Mr. Lowenberg: Exception.

(The wire tap dated December 7, 1946, at 3:15 P. M., was received in evidence and marked People's Exhibit 5-B.)

Q. Will you read People's Exhibit 5-B in evidence?

A. This is a——

Q. Please read the exhibit.

A. An incoming call, December 7, 1946, 3:15 P. M. The inside voice, that of Alvin Paris said, "Hello."

The outside voice; that is the voice of Harvey Stemmer, said, "Hello, what did you do?"

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Alvin Paris said, "I laid 300 to 250 on the Giants and gave one point. Leo made the bet for me."

Harvey Stemmer said, "Good going. Be careful of a tie game."

Alvin Paris said, "Don't worry too much about that."

The defendant Stemmer said, "I will call you again." That is the end of the conversation.

Q. Now, will you direct your attention to the telephone communication intercepted by you on Tuesday, December 10th, at 1:45 P. M.?

[fol. 580] Mr. Lowenberg: May I register an objection to this, if your Honor please, as being incompetent, irrelevant and immaterial?

The Court: Sustained.

Mr. Monaghan: All right, your Honor.

Q. Will you direct your attention now——

Mr. Monaghan: Oh, yes, your Honor, on that December 10th, 1:45 P. M.——

Mr. Lowenberg: May we step to the Bench?

(Discussion at the Bench between the Court and counsel, out of the hearing of the jury, not recorded, after which proceeding- were resumed as follows:)

The Court: I sustained the objection. Go ahead.

Mr. Monaghan: All right.

Q. Please direct your attention to the telephone conversation which you intercepted on Wednesday, December 11, 1946, at 2:02 P. M. Have you it there?

A. I have.

Mr. Monaghan: I offer it in evidence.

Q. Where does it start, at the top of the page?

A. Yes.

Mr. Lowenberg: May I register my objection to that, Judge?

The Court: Your objection is overruled.

Mr. Lowenberg: Exception.

(The telephone tap of December 11, 1946, at 2:02 P. M., was received in evidence and marked People's Exhibit 5-C.)

[fol. 581] Mr. Barshay: May I record an objection to this conversation, sir, on the ground that Mr. Zarowitz

played no part whatever in it, and it is therefore not competent as to him.

The Court: He played no part in what?

Mr. Barshay: In this conversation, sir, December 11, 1946.

The Court: It is your contention that a statement made during the coure of a conspiracy by one of the alleged conspirators is not binding on any of the others during and in furtherance of the conspiracy, before the conspiracy is terminated?

Mr. Barshay: It is my contention, sir, that there is no proof and it is for the jury to say whether or not there is a conspiracy and whether my client joined it.

The Court: I am talking to you as a matter of law.

Mr. Barshay: As a matter of law, the basic principle urged I agree with.

The Court: I say to you, if the jury should find there was a conspiracy and this was an act done, the testimony is not by the accomplice, but the interception of communication which, if the jury should find was made, and if they should decide in their wisdom to give credence to, you contend that there was a conspiracy, that an act done by one of the conspirators in furtherance of the conspiracy before it was ended is not binding on the others?

Mr. Barshay: I say it is binding, but the purpose, first, must be shown.

[fol. 582] The Court: That is for the jury to decide. I was trying to get the point of your objection, because I have a lot of respect for your knowledge of the law and I am paying attention to what you have to say and I am trying to get the reason for your objection.

Mr. Barshay: I submit, sir, that the proof up to now has indicated——

The Court: I see what you mean.

Mr. Barshay: That Mr. Zarowitz has not been proven as a member of the conspiracy.

The Court: Under those circumstances I get your point. I am constrained to deny your motion.

Mr. Barshay: I respectfully except.

The Court: All right.

Q. Will you please read that exhibit?

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A. December 11, 1946, the hour 2:02 P. M., an incoming call. The inside voice, which I identified as that of Alvin Paris, said "Hello."

The outside voice, that of the defendant Harvey Stemmer, said, "Hello, did you hear anything?"

Alvin Paris said, "No, not yet, he is supposed to call me back."

The defendant Stemmer said, "Do you think they can beat them on the up-and-up?"

Alvin Paris said, "They seem to think so."

Harvey Stemmer said, "Is Paschal going to play?"

Alvin Paris said, "No, Reagon is."

Harvey Stemmer said, "You better call Jerry and tell him to lay off because he has already bet 20,000."

[fol. 583] That is the end of that conversation.

Mr. Barshay: Now I move to strike it out on the ground, sir, that it is quite obvious from the conversation that it is not an act in furtherance of any conspiracy.

The Court: I will deny your motion.

Mr. Barshay: I respectfully except.

Mr. Cooper: Just a moment, we want to look at the original, if your Honor pleases.

The Court: You will be able to look at all the originals, just as soon as the District Attorney is through.

Q. Now, will you direct your attention to the telephone conversation intercepted by you on December 11th, Wednesday, at 2:10 P. M.?

A. I have it.

Mr. Monaghan: I offer that in evidence, your Honor.

The Court: Received.

(The telephone tap dated December 11, 1946, 2:10 P. M., was received in evidence and marked People's Exhibit 5-D.)

Q. Now, will you read that telephone conversation, People's Exhibit 5-D, in evidence.

A. December 11, 1946, at 2:10 P. M., an outgoing call was made.

Q. To where?

A. To Elizabeth 3-9677. As the phone on the inside was picked up, the outside voice answer, "Operator."

Alvin Paris said, "Elizabeth 3-9677."

The outside voice said, "Thank you."

[fol. 584] The outside voice again said, "Hello."

The inside voice said, "Hello, Jerry. Alvin. Can you come over and see me?"

The outside voice, that of Jerry, the defendant, Jerome Zarowitz, said, "I will leave now. What's the address?"

Alvin Paris said, "56 West 56th Street."

Q. Now, will you direct your attention to a telephone conversation intercepted on Wednesday, December 11th, at 2:20 P. M.

A. (Witness produces paper.)

Q. Have you that conversation?

A. I have.

Mr. Monaghan: I offer it in evidence.

The Court: Received.

(Telephone conversation of December 11th, 2:20 P. M., received and marked People's Exhibit 5-E, in evidence.)

Mr. Lowenberg: May it appear, your Honor, that all this is being offered over our objection and exception,—that does for all the defendants.

Mr. Monaghan: Did you make a ruling, your Honor?

The Court: Received.

Q. Will you read that exhibit in evidence, it is 5-E.

A. December 11, 1946, the hour of 2:20 P. M. An incoming call. The inside voice of Alvin Paris, said, "Hello."

Outside voice, that of the defendant, Harvey Stemmer, said "What happened?"

Alvin Paris said, "Not so good."

Defendant Harvey Stemmer said, "What's the matter?"

[fol. 585] Alvin Paris said, "Backed down."

Harvey Stemmer said, "Both of them?"

Alvin Paris said, "Just one."

Harvey Stemmer said, "What was the matter?"

Alvin Paris said, "He said if they could win he could buy his kids something extra."

Harvey Stemmer said, "How about the other guy?"

Alvin Paris said, "He said he could call later."

Harvey Stemmer said, "Did you tell him it was one thousand if he could make a fumble in the backfield at the right time?"

Alvin Paris said, "I explained all that."

"He said they were leaving at 3; he would call later."

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Mr. Lowenberg: May it appear for the purposes of the record, your Honor, that when this witness uses the name, for example, of Alvin Paris, or Harvey Stemmer, that it's a conclusion from the voice itself; that there is nothing in the telephone conversation itself to indicate that those respective names were used, Harvey Stemmer or Alvin Paris.

Mr. Monaghan: The witness has so testified,—the voice which he identified.

Mr. Lowenberg: I understand that, but I want to get it straight for the record, that those names are not used in the conversation itself.

Mr. Monaghan: That is right.

[fol. 586] Mr. Lowenberg: But on merely a substitution on his part for the voice.

Mr. Monaghan: That is right.

Mr. Lowenberg: That is what I mean.

The Court: Is that 5-B on which I overruled his objection?

Mr. Monaghan: Yes.

The Court: On which I sustain an objection.

Mr. Monaghan: Sustained an objection.

The Court: Was it 5-B?

The Court Clerk: It was originally offered as 5-B, and refused, and then we marked another one as 5-B in place thereof.

The Court: In view of the conversation, I will take it.

Mr. Monaghan: Does your Honor recall what the date of that one was?

The Court Clerk: I think it was 2:10 P. M. on the 6th.

The Court: December 10th, 1:45 P. M. December 10th, 1:45 P. M.

Mr. Lowenberg: May my objection and exception remain on the record?

The Court: Yes.

Mr. Lowenberg: Thank you, your Honor.

Q. Now, I bring you to Tuesday, December 10th, at 1:45 P. M.

A. I have it (producing paper.)

Mr. Monaghan: I offer it in evidence. That is the 1:45 P. M.

Mr. Lowenberg: My objection and exception is properly noted?

The Court: Yes.

[fol. 587] The Court Clerk: That will be 5-F, if your Honor pleases?

The Court: Yes.

(Telephone conversation of December 10th, 2:20 P. M., received and marked People's Exhibit 5-F, in evidence.)

Q. Officer Jove, will you please read Exhibit 5-F, in evidence?

A. December 10, 1946, 1:45 P. M., an incoming call. Inside voice said, "Hello."

Outside voice——

Q. (Interrupting) Who—did you identify the voices?

A. The inside voice, is female voice.

Q. A female voice——

A. (Interrupting) The outside voice is the voice of the defendant Harvey Stemmer. He said, "Is Alvin in?"

The inside voice, female voice, "No. Who is calling?"

Harvey Stemmer said, "Harvey. When do you expect him?"

The inside voice, female voice again said, "This is Mrs. Paris, Harvey."

"Alvin will be back between 3 and 4, and has to leave at 4 again."

Harvey Stemmer said, "O.K., Mrs. Paris. I will get in touch with him later. Goodbye."

Female voice said, "Goodbye."

Q. Now, will you please turn your attention to the telephone conversation intercepted on Wednesday, December 11th at 2:40 P.M.?

A. (Witness produces paper.)

Q. Have you it?

A. I have.

Mr. Monaghan: I offer it in evidence, your Honor.

The Court: Received. The defendant Stemmer has an exception.

[fol. 588] (Telephone conversation of December 11th, at 2:40 P.M., received in evidence and marked People's Exhibit 5-G, in evidence.)

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Q. Now, will you read Exhibit 5-G, in evidence?

A. December 11, 1946, at 2:40 P.M. An incoming call. The inside voice, that of Alvin Paris, said, "Hello."

The outside voice, that of Harvey Stemmer, said, "Are they still there?"

Alvin Paris said, "No, they left already."

Harvey Stemmer said, "When are you going to see them?"

Alvin Paris said, "Tomorrow. They want to talk it over."

Harvey Stemmer said, "Listen, you have to make it five thousand and twenty-five hundred. With the seventy-five hundred they are bound to see it our way. Don't you see we have to do something. I thought the bet wasn't to be made until the day before the game."

Alvin Paris said, "Everything will turn out all right. When I see them tomorrow I will give them the new set-up."

Harvey Stemmer said, "You have to do it."

Alvin Paris said, "O.K., call me later."

Harvey Stemmer said, "So long."

Q. Now, will you look at the conversation intercepted on Wednesday, December 11th, at 3:20 P. M.?

A. (Witness produces paper.)

Mr. Monaghan: I offer that in evidence.

(Telephone conversation of December 11th, 3:20 P.M., marked People's Exhibit 5-H, in evidence.)

[fol. 589] Q. Will you read that exhibit, please?

A. December 11th, 1946, 3:20 P.M., an incoming call. The inside voice, that of Alvin Paris, said, "Hello."

Harvey Stemmer said, "Hear anything?"

Alvin Paris, "No, not yet."

Harvey Stemmer said, "I hear it is down to ten now." You give the five grand to the main guy and the other bird will have to take the twenty-five hundred; there is nothing for him to do."

Alvin Paris said, "Call me again later."

Harvey Stemmer said, "O.K."

Q. Will you bring your attention to the telephone conversation intercepted on Wednesday, December 11th, at 4:10 P.M.?

A. (Witness produces paper.)

Mr. Barshay: Objected to on the ground it is foreign and immaterial to this issue.

The Court: The issues of the case?

Mr. Barshay: Yes.

The Court: Motion denied.

Mr. Barshay: I respectfully except.

Mr. Monaghan: I offer it in evidence.

The Court: Mr. Barshay, there are clauses which may be separated there, if you want it.

Mr. Barshay: May Mr. Monaghan step up?

(Mr. Monaghan and Mr. Barshay confer with the Court at the Bench out of the hearing of the jury.)

The Court: Overruled.

Mr. Barshay: Exception.

[fol. 590] (Telephone conversation of December 11th, at 4:10 P.M., marked People's Exhibit 5J, in evidence.)

Q. Will you read Exhibit 5J, in evidence?

A. December 11, 1946, at 4:10 P.M., an outgoing call. The outside answer, "Operator."

The inside said, "Elizabeth 3-9677." That was the voice of the defendant Jerome Zarowitz.

Q. That's the one on the inside who said, "Elizabeth"——

A. "3-9677."

Q. Yes.

A. (continuing) The outside said, "Hello." Defendant Jerome Zarowitz said, "Jerry. What's doing?"

The outside voice said, "Nothing on baskets. All in all about 23,250 and seven points."

Defendant Zarowitz said, "That's all?" "I'm over at Alvin's office."

The outside voice said, "How do you make out?"

Defendant Zarowitz said, "One guy is leery."

The outside voice said, "I suspected as much."

Defendant Zarowitz said, "Will see you later."

Mr. Barshay: May the record show that the word "Zarowitz" is nowhere listed in this conversation?

The Court: That's correct.

Now, as to December 12, 1946, 6:25 P.M. the objection is sustained.

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Q. Will you look now at telephone conversation of December 13th, Friday, at 4:50 P.M.?

A. (Witness produces paper.)

Q. Have you it?

A. Yes.

[fol. 591] Mr. Segal: Is there any reason, your Honor, why we cannot have copies submitted at once so we won't have the trouble of going through them——

Mr. Monaghan: All right, take all the copies there.

Now, at 4:50 P. M. I offer it in evidence, your Honor.

Is it received, your Honor?

The Court: Received.

(Telephone conversation of December 13th, at 4:50 P. M., marked People's Exhibit 5-K, in evidence.)

Q. Now, please read 5-K, in evidence, to the jury,—the Court and jury.

A. December 13th, 1946, at 4:50 P. M., an outgoing call. The outside voice answer, "Operator."

The inside voice, that of Alvin Paris, said, "Operator, Elizabeth 3-9377."

The outside voice said, "Surely; what's your number?"

Alvin Paris said, "Circle 5-8020."

The outside voice said, "Hello."

Alvin Paris said, "Put Jerry on."

Outside voice said, "Hello, Al." That was the voice of Defendant Jerome Zarowitz.

Q. The outside voice that was put on, that came on the phone?

A. That's right. (Continuing) Alvin Paris said, "Just came back. M. said, 'It is not sure.' F. said no good."

Defendant Zarowitz said, "Then it is not so good."

Alvin Paris said, "Well, M may take a fumble or two if he has a chance."

[fol. 592] Defendant Zarowitz said, "How much?"

Alvin Paris said, "No price. He said my father and I have been good to him, that he will do anything for us."

Defendant Zarowitz said, "Well, that's not bad."

Alvin Paris said, "I told him I got ten thousand. How much have you got in it?"

Defendant Zarowitz said, "Seventy-five hundred."

Alvin Paris said, "If you are heavy, get off."

Defendant Zarowitz said, "How they look?"

Alvin Paris said, "They may beat the Bears."
Defendant Zarowitz said, "Won't you see him again?"
Alvin Paris said, "No, but I am going to call him up."
Defendant Zarowitz said, "O.K. Let me know."
That's the end of that conversation.

Mr. Barshay: Your Honor, may the record show that the name "Zarowitz" does not appear in this sheet, and may the record further show from the person alleged to be Zarowitz, no words by the name of Jerry appear. It is the witness's own conclusion.

The Court: If what you say is so,—the record speaks for itself.

Q. Will you look at the intercepted telephone conversation of Friday, December 13th, at 6:15 P. M.?
A. (Witness produces paper.)

Mr. Monaghan: Have you it?
[fol. 593] Mr. Monaghan: I offer the conversation of 6:15 p. m., Friday, December 13th, in evidence.
The Court: Received.

(Original notes of Patrolman Jove for 6:15 p. m., December 13th, 1946 received in evidence, and marked as People's Exhibit 5L.)

Q. Will you please read People's Exhibit 5L in evidence to the Court and jury?
A. December 13th, 1946, 6:15 p. m. incoming call.
Inside voice says, "Hello." That's the voice of Alvin Paris.

Q. I wish you would keep your voice up. It is quite difficult to hear over in this corner. Keep your voice up.

A. The outside voice, the voice of the defendant Stemmer, said, "How was the trip?"
Alvin Paris said, "It is quite a trip, and with all the driving around I did, I am tired."
The defendant Stemmer said, "How did you make out?"
Alvin Paris said, "One backed out, but the other definitely wants to go ahead."
The defendant Stemmer said, "Well, that's all you need."
Alvin Paris said, "I am really afraid for him. After all, he has next season to think about. I told him he had better forget about it. If it was only one touchdown, it wouldn't

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be so bad, but two touchdowns is taking a chance. I was talking to Pete, and he said it was O.K. by him to go ahead with one, but Jerry said he would rather forget about it, as we can't get the two of them in on it."

[fol. 594] The defendant Stemmer said, "Well, if you have one, what the hell, that's all right. What is it costing?"

Alvin Paris then said, "$2500 and $1000 was offered. I called him up after I spoke to Jerry and made him go to the phone booth and call me back in ten minutes, and when I told him it was off and for the boys to go out and win, he said there will be no trouble, that the other one would not help him, but he would not harm him either. He said he needs the dough. He is going to call me in the morning."

The defendant Stemmer said, "Hell, that's good enough angle, isn't it?"

Alvin Paris said, "I am really afraid for him. After all, if there is any break in their friendship, there is no telling what might happen."

The defendant Stemmer said, "You had better hand up if you are waiting for a call from Jerry."

Alvin Paris said, "I am going to call him, and you can call me back later."

The defendant Stemmer said: "O.K., Alvin."

Mr. Lowenberg: May it appear, if your Honor pleases, that at no place is the name of Harvey Stemmer used in this exhibit, except the conclusion of this witness, that it is his voice?

The Court: All right.

Mr. Barshay: May I interpose an objection? On the ground it appears from this alleged statement that the defendant Zarowitz withdrew from the conspiracy, and [fol. 595] therefore it is not binding upon him. That is not an admission he was in it, but it supports my legal argument.

The Court: Motion denied.

Mr. Barshay: I respectfully except.

Q. Now, will you turn to the conversation of Friday, December 13th, at 6:33 p. m.? Have you it?

A. (Handing document to counsel.)

Mr. Monaghan: I offer it in evidence.

The Court: Received.

(Original notes of Patrolman Jove for 6:33 p. m., December 13, 1946, received in evidence and marked People's Exhibit 5-M.)

Q. Please read People's Exhibit 5-M to the Court and jury.

A. December 13th, 1946. This is 6:33 p. m., an outgoing call.

Outside answer, "Operator."

Inside, the voice of Alvin Paris said, "Elizabeth 2-6930."

Outside, "What is your number, please?"

Alvin Paris said, "Circle 5-7366."

Outside said, "Thank you."

Outside said, "Hello."

Alvin Paris said, "Hello, Red."

Outside voice said, "Hello, Alvin, hold on a second."

"Hello, Alvin." That was the voice of the defendant Zarowitz.

Q. Where does that come in? Who said, "Hello, Alvin, hold on a second"?

A. After, "Hold on a second" another voice.

Q. Then an outside voice came on and said, "Hello, Alvin"?

A. That's right.

[fol. 596] Q. Whose voice was that?

A. The defendant, Jerome Zarowitz. Alvin Paris said, "Pete called and was willing to go either way. Harvey thought one would be able to do the trick. I am too damned tired to even think straight."

The defendant Zarowitz said, "Well, Alvin, as long as the two cannot agree, it is best to tell the boys to go on and win, and we can take the six to five on pull out; even if we lose a grand or so, it will be far better this way."

And then Paris said, "He is going to call me tomorrow morning, and I will tell him to go out and play like hell to win, and to forget about the other angle."

So the defendant Zarowitz said, "That's the best we will be able to do, as long as they both cannot agree."

Alvin Paris said, "O.K., Jerry, I will tell Pete and Harvey. So long."

The defendant Zarowitz said, "Goodbye."

Q. Will you look at Friday, December 13th, at 6:45 p. m.? Have you it there?

A. I have.

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Mr. Monaghan: I offer it in evidence.
The Court: Received.

(Original notes of Patrolman Jove for 6:45 p. m. December 13, 1946, received in evidence, and marked People's Exhibit 5-N.)

Q. Will you read that People's Exhibit 5-N in evidence to the jury?

A. December 13, 1946, 6:45 p. m., outgoing call to Jerome 8-3950.

Outside voice said, "Hello." That is the voice of the defendant Krakauer.

[fol. 597] Q. The outside voice was Krakauer's voice?

A. That's right. Inside voice, the voice of Alvin Paris, said, "Hello, Pete. I was talking to Jerry, and he thought it best we drop the matter. As a matter of fact, I feel that way, too. There is a chance of friction between them. He is sure of no help from him, but he will not interfere, either."

The defendant Krakauer said, "Best that way, if they go all out and win, really play."

Alvin Paris said, "O. K., Pete, we will be hearing from him tomorrow morning and I will put the bare facts down to him."

That's the end of that conversation.

Q. And 7 p. m., Friday, December 13th, have you that?

A. I have.

Mr. Monaghan: I offer it in evidence.
The Court: Received.

(Original notes of Patrolman Jove for 7 p. m., December 13, 1946, was received in evidence and marked People's Exhibit 5-O.)

Q. Please read that to the Court and jury.

A. On December 13, 1946, at 7 p. m., an incoming call. The inside voice, that of Alvin Paris, said, "Hello."

Outside voice, that of the defendant, Harvey Stemmer, said, "Did you hear from Jerry."

Alvin Paris said, "I was talking to Jerry and *and* Pete, and we are all of the same opinion, to drop it off. As long as F. F. cannot be induced to go along, there is a chance of them breaking friendship, and not telling what might happen."

[fol. 598] Now the defendant Harvey Stemmer said, "When he calls in in the morning, put it to him that you don't want to see anything come between them, as long as the both of them cannot get along together, it is best to drop it, or maybe F. F. would go to Owens and say, 'I am not up to the game today,' be taken out."

Alvin Paris said, "No, no, I am going to bet a grand on the Giants, taking 10 points. There is no telling what those boys would do if they go in there and really play. This F. F. himself got three passes for as many touchdowns if he is in the groove and knows it is on the up and up. He has to get F. F., or nothing doing. No use of him working for us like a bull and have the other break his back."

Defendant Stemmer said, "Tell him it is the both of them, or it is out, and for them to be the best of friends, and to go out and play, play like hell to win."

Alvin Paris said, "He is calling tomorrow. I have to know to call that fellow at noontime for the setup."

The defendant Stemmer said, "We'll be hearing from you, then, Alvin."

Alvin Paris said, "So long, Harvey."

Q. Now, will you turn to December 14th at 4:05 p. m.?

The Court: Sustained.

Mr. Monaghan: Your Honor, may the witness testify that there was a conversation on December 14th at 4:05 p. m.

The Court: Yes.

Mr. Monaghan: And between whom it was?

The Court: Yes.

[fol. 599] Q. Will you look at your notes and tell the Court and jury whether there was a telephone call at 4:05 p. m. on December 14, 1946?

A. December 13th?

Q. December 14, 1946?

A. Yes.

Mr. Barshay: May I ask your Honor to instruct the jury they may not speculate as to the contents of that conversation?

The Court: That is correct. I so charge.

Q. Have you your notes?

A. Yes.

Q. Who was the call between? Who made the call?

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A. Alvin Paris made the call.
Q. To whom?
A. To Merle Hapes.
Q. Where?
A. At Bear Mountain Inn.
Q. That was at 4:05 in the afternoon?
A. At 4:05 on December 14, 1946.
Q. Will you now look at Saturday, December 14th, at 4:10 p. m.? Have you it?
A. I have.

Mr. Monaghan: I offer it in evidence.
The Court: Received.

(Original notes of Patrolman Jove for 4:10 p. m., December 14, 1946, was received and marked People's Exhibit 5-P.)

Mr. Barshay: May I object to it upon the ground that it appears by its content and date that it is after the withdrawal from the alleged conspiracy by the defendant Zarowitz?
The Court: Overruled.
Mr. Barshay: Exception, sir.
[fol. 600] Mr. Segal: We object on the ground it is beyond the date of the conspiracy.
The Court: If it is beyond the date of the conspiracy, it is not binding on any of the defendants, except those who were making statements.
Mr. Monaghan: December 14 is the date of the indictment.

Q. Will you read People's Exhibit 5-P?
A. On December 14, 1946, at 4:10 p. m., an outgoing call to Jerome 8-3950.
Outside voice, that of the defendant Krakower, said, "Hello."
Inside voice, that of Alvin Paris, said, "Hello, Pete. It is O. K. that way. They are going out to break their necks. I am taking him and Filchock out tomorrow night to keep up their best of friendship."
The defendant Krakower said, "It is swell this way."
Alvin Paris said, "Tell Jerry to get on the Giants, taking 10 points."
The defendant Krakower said, "O. K., Alvin."
Alvin Paris said, "Goodbye."

Q. Will you look at the telephone conversation on Saturday, December 14th, at 6:25 p. m.?

The Court: Objection sustained. Step up here gentlemen, as to December 14, 1946.

(Discussion at the Bench between the Court and Counsel, out of the hearing of the jury, not recorded.)

Q. Now, will you direct your attention to the telephone [fol. 601] conversation of December 14th, 7:05 P. M., have you it?

A. I have.

Mr. Monaghan: I offer a portion of that, your Honor.

The Court: You have an objection and exception to that, and so has Mr. Segal.

Mr. Lowenberg: All right.

The Court: Only the portion which is in parenthesis which I have bracketed may be read.

Mr. Lowenberg: May we note our objection to that portion, too, Judge?

Mr. Monaghan: I offer that part in evidence, your Honor, which is marked in parenthesis.

The Court: All right.

(The telephone tap of December 14, 1946, at 7:05 P. M. was received in evidence and marked People's Exhibit 5-Q.)

Mr. Segal: May I look at a copy, first, please?

The Court: Show it to Mr. Segal.

Mr. Monaghan: Have you a copy there?

Mr. Segal: We have got it now.

The Court: It is admitted only on the issue of association between the two defendants referred to.

Q. Now, will you read the top part then, then drop down to the part where I have indicated—who is the call between?

A. December 14, 1946, 7:05 P. M., an outgoing call to Jerome 8-3950.

Q. Where was that call made from?

A. That call was made from 56 West 56th Street, and that call——

[fol. 602] Q. Over the telephone?

A. Over the telephone, Circle 5-7366.

Q. That was in Paris' apartment, is that right?

A. That's right.

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Q. Whom was it between?

A. This call is between the defendant Krakower and the defendant Harvey Stemmer.

Q. Who is in Paris' apartment calling out?

A. Harvey Stemmer.

Q. And where was he calling?

Mr. Lowenberg: I object to this, if your Honor please.

The Court: Sustained.

Mr. Lowenberg: I move to strike out all of this.

The Court: All of what?

Mr. Lowenberg: All of these questions pertaining to where the call came from.

The Court: Overruled. Motion denied.

Mr. Lowenberg: Exception.

Q. Now, when you say "in," who is the voice that you describe as "in?"

The Court: Pardon me, did you check those phones and determine where they were?

The Witness: Yes.

The Court: Did you find out where they were located?

The Witness: Yes.

The Court: Those three telephones?

The Witness: I removed those telephones myself from the premises.

The Court: Which premises?

The Witness: 56 West 56th Street.

[fol. 603] The Court: What apartment?

The Witness: The second floor, two in the front, one in the rear.

The Court: What is the number of the apartment?

The Witness: It is one floor occupied by Alvin Paris.

Q. On the night of Paris' arrest, December 14th, did you accompany him to the apartment?

A. I did.

Q. And did you have a conversation with him about the phones?

A. I did.

Q. Will you tell the Court and jury what the conversation was?

Mr. Lowenberg: That is objected to.

The Court: I will sustain the objection.

Mr. Monaghan: All right.
The Court: But that is where he found the phones?
Mr. Monaghan: That's right.
The Court: That is what he objected to just now.
Mr. Monaghan: I see.
The Court: Go ahead.

Q. All right, now will you read that portion of the conversation we have marked out and tell who it was that was talking there?
A. The inside voice, in addition to other conversations, said——
Q. Who is the inside voice?
A. That is the voice of the defendant Harvey Stemmer: "We will get a real tough team to make a game."
[fol. 604] The outside voice, that of the defendant Krakower said, "Where?"
Harvey Stemmer said, "Out of town, without hurting the office. Next year we will do all right with football."
The defendant Krakower said, "All right." Oh, Harvey——
Q. All right, and what?
A. The defendant Harvey Stemmer interrupted and said, "What about tomorrow?"
The defendant Krakower said, "You say ten is the pick?"
The defendant Stemmer said, "I don't know that there is anything, we told Hapes we want him to win, they will be playing their hearts out. Good-bye."

Mr. Barshay: Could we have a direction from the Court as to this conversation?
The Court: It is only admissible, if anything, against the defendant who makes the statement.
Mr. Barshay: Thank you, sir.
Mr. Monaghan: Will you bear with me just one moment, your Honor?
The Court: Yes.
Mr. Monaghan: May I approach the Bench?
The Court: Yes.

(Discussion at the Bench between the Court and counsel, out of the hearing of the jury, not recorded.)

The Court: Remember not to talk about the case and not to form any opinion, you may step out.

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[fol. 605] (The jury retired from the courtroom, and the following transpired:)

The Court: Do you waive any further notice to the jury?

Mr. Barshay: Yes.

Mr. Segal: Yes.

Mr. Lowenberg: All right.

The Court: I am going to let them go for tonight.

Now, let us agree to finish this case tomorrow with summation.

Mr. Lowenberg: All right, Judge.

Mr. Barshay: Yes.

Mr. Segal: Yes.

The Court: And give the case to the jury Saturday morning.

Mr. Segal: May I ask that Mr. Monaghan have the officers here available in case I want to put a question, just a few questions to any of them?

The Court: The officers?

Mr. Segal: Yes, the officers that were present on the morning of the——

Mr. Monaghan: What officers?

Mr. Segal: Well, you had O'Brien and——

Mr. Monaghan: When I questioned Paris, do you mean?

Mr. Segal: Yes, I want them down. I may decide just to put one question or so. Will you have them down, all those that were there?

The Court: Be prepared to sum up tomorrow, counsel.

Mr. Monaghan: Is that when Paris was examined, do you mean?

[fol. 606] Mr. Segal: Sid Paris.

The Court: Counsel, do we understand each other,—to be prepared to sum up tomorrow.

Mr. Lowenberg: All right.

Mr. Segal: Yes.

Mr. Lowenberg: I will be ready to sum up, with the only condition that Mr. Monaghan sum up the same day.

The Court: That is fair. I want to give the case to the jury Saturday morning, in the event I deny your motions.

(Whereupon an adjournment was taken to Friday, March 7, 1947, at 10:30 A. M.)

New York, March 7, 1947.

Trial Continued

PATROLMAN JOSEPH JOVE—Continued.

Direct examination (Continued).

By Mr. Monaghan:

Q. Officer, will you direct your attention to the telephone conversation on December 14th, on Saturday, at 6:25 P. M.? Have you it?

A. Was that put in evidence yesterday?

Q. No.

A. I have it.

Q. Did you intercept a telephone call on December 14th at 6:25 P. M.?

A. I did.

Q. Who are the parties talking in that telephone conversation?

[fol. 607] Mr. Barshay: I object to that as a conclusion.

Mr. Monaghan: I am not giving it. I am just identifying it. I am asking who the parties were talking.

The Court: You mean he identified the voices?

Mr. Monaghan: Yes.

The Court: I will allow it.

Q. Did you identify the voices in that telephone conversation?

A. I did.

Q. Will you tell us who the voices were in that conversation?

A. The voice on the inside in 56 West 56th Street was the voice of Harvey Stemmer. The voice on the outside was the voice of Jerome Zarowitz.

Q. And which one put in the call?

A. The defendant Harvey Stemmer.

Q. Where did he put the call through to, what number did he dial or call?

A. He called through the operator Elizabeth 2-6930, and he dialed over the telephone Circle 5-7366.

Mr. Monaghan: May we have that marked for identification, your Honor, that telephone call?

(Original notes of Patrolman Jove of telephone tap at 6:25 P. M., December 14, 1946, marked People's Exhibit 5-R, for identification.)

Mr. Monaghan: Your Honor, as I recollect, there was an objection to the admission of this into evidence last night, [fol. 608] which you sustained, this one that is now marked for identification.

Mr. Barshay: May I ask the Court to direct the jury that they may not speculate or surmise with respect to the contents of this alleged conversation?

The Court: I so charge.

Mr. Barshay: Thank you.

Mr. Monaghan: That is all from this witness.

Cross-examination.

By Mr. Lowenberg:

Q. May I have your notes, Officer, which were received in evidence?

Court Officer: These are the notes.

By Mr. Monaghan:

Q. Mr. Jove, these wires which you had intercepted, they were in New York County, were they not?

A. They were.

Q. The telephones in Paris's apartment?

A. Yes.

Q. All these interceptions were in New York County?

A. That's right.

Mr. Monaghan: That is all.

By Mr. Lowenberg:

Q. Now, Officer, you were born in Puerto Rico?

A. Yes, sir.

Q. And how long have you been in this country?

A. Since 1923.

Q. And I notice you still speak with an accent?

A. Yes, sir.

Q. Did you go to school here?

A. I did not.

[fol. 609] Q. Did you have any educational training in this country at all?

A. I did not.

Q. And you acquired the knowledge of the English language in conversation with people who did speak our language; is that correct?

A. It is not correct.

Q. You mean you had a knowledge of the English language before you came here?

A. I certainly did.

Q. You studied English in Puerto Rico?

A. I did.

Q. Now, at times you have difficulty in expressing yourself, haven't you, due to this accent?

Mr. Monaghan: What was that question?

(Last question repeated by the stenographer.)

A. I do not.

Q. You mean you speak clearly?

A. I think so.

Q. You think so?

A. Yes, sir.

Q. Now, I notice, Officer, that on some of these notes dealing with these telephone conversations—and I will refer you particularly to People's Exhibit, in evidence, 5-K—first, I refer you to People's Exhibit 5-K.

Mr. Monaghan: What is the date and hour of that, please.

Mr. Lowenberg: This was on December 13, 1946.

Q. Is that the hour, 4:15?

A. 4:15 P. M.

Q. I notice that there were several erasures. I refer you to Exhibit 5-L instead. That was a conversation on De-
[fol. 610] cember 14th at 4 P. M. I show you that exhibit and I will ask you whether there are a number of erasures and writings over erasures in that exhibit?

A. One erasure and some writing.

Q. That was on page one?

A. That's right.

Q. Now, I refer you to page 2, and I will ask you whether there are not eight erasures and rewritings?

A. Two erasures and some writing, not rewriting, clearing up the word.

Q. I refer you to page 3, and I will ask you how many erasures there are, and rewritings?

A. One erasure and no rewriting, just clearing the words.

Q. Clearing the words?

A. That's right.

Q. When were those clearing the words and erasures done?

A. Some time during the time I was tapping, probably that day.

Q. Some time when?

A. During the time I had the tap.

Q. Some time during the time you had the taps?

A. That's right.

Q. In other words, you stopped taking telephone messages and made these erasures?

A. I wasn't taking telephone messages all the time.

Q. In other words——

Mr. Monaghan: May he finish his answer?

Q. Yes, do.

A. I wasn't taking telephone messages all the time. I had lapse of times in between.

Q. And as you had a lapse of time in between you started to read your notes?

A. Yes.

Q. And you filled in what you thought was necessary in those notes?

A. I did not.

[fol. 611] Q. You made erasures of words and substituted other words, didn't you?

A. I did not.

Q. Didn't you say a few minutes ago that you made erasures?

A. Yes.

Q. And those erasures were made because you wanted to substitute other words in those taps?

A. I did not.

Q. Why did you make those erasures?

A. To make the word clearly.

Q. Clear?

A. Yes.

Q. You knew you were going to read these notes, didn't you?

A. Yes.

Q. And you understood them in the first instance, didn't you, without erasing any words and making them clear?

A. The words originally were not complete; they were abbreviated, broken down to my own style of writing, so I made them clear.

Q. Now, you say that you merely wrote them down in your own style of writing, and you rewrote them to make them clear?

A. That's right.

Q. Didn't you understand your own style of writing?

A. I certainly did.

Q. Then, why did you have to make it clear?

A. To make it clear for anybody that wants to recopy them or read them.

Q. Did you give them to anybody to recopy?

A. Yes, I did.

Q. Whom did you give them to recopy?

A. In my office.

Q. Did you stay there while the person was recopying the notes?

A. No.

Q. Did you leave your notes with that party?

A. Yes.

Q. When did you see the notes for the last time before [fol. 612] you came to this court? I refer to the original notes?

Mr. Monaghan: You mean this morning?

Mr. Lowenberg: Yes, sir, yesterday.

A. I don't understand what you mean.

Q. When before yesterday did you see these notes, these original notes? When for the last time before yesterday was that?

A. The day before yesterday.

Q. The day before yesterday?

A. Yes.

Q. Is it possible that you made the erasures and changes of these words the day before yesterday.

A. It is not possible.

Q. Did you study your notes the day before yesterday?

A. I did not study them.

Q. Did you read them through?

A. I read some of them through.

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Q. Why did you read some of them through?

A. I was being asked by the District Attorney Monaghan to refer to certain things.

Q. And it was at his request that you referred to said notes?

A. That's right.

Q. You did not refer to all the notes, did you?

A. No.

Q. You only referred to some of the notes; is that correct?

A. That's right.

Q. Now, I will refer you to People's Exhibit 5-H, in evidence, a call made on December 11th at 4 P. M. Are there any erasures in those notes?

A. Yes, there is.

Q. How many?

A. Two.

Q. Two?

A. Yes.

[fol. 613] Q. Any rewritings?

A. Can I explain the erasures?

Q. Just answer the question, please.

A. One rewriting.

Q. In addition to two erasures?

A. Two incomplete erasures.

Q. Two incomplete erasures?

A. That's right.

Q. And you made those erasures and rewritings when?

A. The time I was at the tap.

Q. The time you were at the taps?

A. That is right.

Q. And you did that also for the purpose of classifying it, is that it?

A. That's right.

Q. You had your own notes there, didn't you?

A. I did.

Q. And how long have you been writing English?

A. Since I first went to school.

Q. When was that?

A. I don't remember the year, when I was six or seven years old.

Q. Seven years old?

A. Yes.

Q. Down in Puerto Rico?

A. Yes, sir.

Q. I see. Now, I will show you People's Exhibit 5-G in evidence, on December 11th at 3 P. M.

A. Yes.

Q. How many erasures are there there?

A. None.

Q. Are there rewritings?

A. Yes.

Q. How many?

A. Three.

Q. Three?

A. Yes.

Q. And that was done also, I assume, to clarify your notes?

A. Yes.

Q. Didn't you think that it was important that your notes remain as they were at the time you were taking those tapped telephone conversations without making erasures and rewritings?

A. I did not.

[fol. 614] Q. Do you always make erasures and rewritings in all your cases?

A. I clarify my writing, yes.

Q. And do you always make erasures in all your cases?

A. Yes.

Q. And in all instances you always said that it was the conversation of a defendant that you heard on the telephone?

A. That's right.

Q. There was never any exception?

A. No.

Q. Now, I show you People's Exhibit 5-E for identification, a conversation as to December 11th at 2:02 P. M.; how many erasures there?

A. There is an incomplete erasure in here, one incomplete.

Q. And that was done to clarify?

A. Clarify the word "something."

Q. "Something"?

A. That's right.

Q. And that was done to clarify the language?

A. Not the language.

Q. To clarify the word?

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A. The ending of the word, "something," which I did not have complete at the time.
Q. You did not have it complete?
A. That's right.
Q. Now, I will take you back to People's Exhibit 5-K in evidence and I will refer you to the word "wouldn't."
A. That's right.
Q. It was inserted, wasn't it?
A. It was not.
Q. There is an erasure there, isn't there?
A. It is an erasure, you can see the word underneath.
Q. Please answer the question.

Mr. Monaghan: I submit he is answering the question.
[fol. 615] The Court: Read the question, please.

(Question repeated by the stenographer.)

The Court: Answer the question.
The Witness: Yes.

Q. And that was an erasure of the entire word, is that correct, yes or no?
A. Yes.
Q. And you wrote another word?
A. I did not.
Q. You did not?
A. I did not.
Q. And may I have this, please?
A. Yes.
Q. And you did that to clarify?
A. Yes.
Q. The word?
A. That's right.
Q. In other words, if you looked at it three weeks later you would not know that the word "wouldn't" was there, you had to clarify it?
A. For myself.
Q. What?
A. I would know it was there.
Q. You would know?
A. Yes.
Q. You did not insert the word because you wanted to conceive of these conversations, did you?
A. I don't understand that question.

Q. You did not think up those conversations and then wrote them out, did you?

A. Absolutely not.

Q. You wouldn't do that?

A. Absolutely not.

Q. Now I will show you People's Exhibit 5-M in evidence, a conversation as of December 17th at 7 P. M., how many erasures are there?

A. The conversation is on December 13th.

Q. 13th, rather. How many erasures are there?

A. Two; rather, one erasure.

Q. Now, I will show you the words "even think".

A. That's right.

Q. That was inserted, wasn't it?

A. It was not.

[fol. 616] Q. There was an erasure there, wasn't there?

A. Not on the full "even think," only on the word "think."

Q. I asked you, Officer Jove, is there an erasure there, yes or no?

A. Yes.

Q. Then you, after the erasure inserted the words, "even think," didn't you?

A. I did not.

Q. You did not?

A. No.

Q. Doesn't the words "even think" appear there?

A. Yes.

Q. When were the words "even think" written in after the erasure?

A. At the time of the tap.

Q. When at the time of the taps?

A. Some time after I had taken the conversation.

Q. Did you reread this message, this purported telephone message before you inserted the words "even think"?

A. Certainly.

Q. You did?

A. Along the line.

Q. You thought that "even think" would look stronger in there, didn't you?

A. I did not.

Q. You did not?

A. No.

Q. You would not do that?
A. I certainly would not.
Q. I will show you People's Exhibit 5-O in evidence, and I will ask you how many erasures there are on the pages.
A. None.
Q. None?
A. None.
Q. How many words have been rewritten?
A. There is——
Q. Count them.
A. There is five words written over the other words.

Mr. Monaghan: May I see that just a moment?
Mr. Lowenberg: Sure, and I am going to show it to the jury.
[fol. 617] Mr. Monaghan: All right.
Mr. Lowenberg: May I show this exhibit to the jury?
The Court: Not at this time, the jury may see the exhibit later.
Mr. Lowenberg: All right, Judge, thank you.

Q. They were words written over the other words, you say?
A. Over the same word.
Q. Over the same word?
A. That's right.
Q. And that was to clarify?
A. The word.
Q. To clarify the word?
A. That's right.
Q. In other words, you would not be able to recognize it unless you clarified it?
A. I will be able to recognize it, other people may not.
Q. Didn't you think it was important to leave the notes as they were?
A. I thought it was important to make the word clear.
Q. You thought it was important to make the words clear because you wanted to put in there what you imagined you heard?
A. I never imagined I heard anything.
Q. You wouldn't do that?
A. Certainly not.
Q. Now, let me ask you this, officer, how long during the day were you on the taps, for how many hours constantly?

A. Any particular day?
Q. Well, take the first day, the first day was what?
A. Monday.
Q. What date?
A. The 5th.
Q. The 5th?
A. Yes.
Q. How many hours were you on the tap that day?
A. Three or four or five.
Q. Three or four or five?
A. That's right.
Q. Were you doing other work during that day?
A. Yes.
[fol. 618] Q. What other work were you doing that day?
A. Other police work, other investigations.
Q. You sat there for five hours taking down telephone taps?
A. Possibly less than five, I said three, four or five hours.
Q. You don't recall?
A. I don't remember.
Q. And the next day, how long were you on the taps?
A. Possibly the same period of time.
Q. The first day during what hours were you on the taps?
A. The afternoon.
Q. Between what hours?
A. Between one and five or one and four, some time like that.
Q. The second day how long were you there, between what hours were you on the taps?
A. Around the same time.
Q. The day following how long were you on the taps, that would be the 7th?
A. Four or five hours.
Q. And on 8th?
A. That was a Sunday.
Q. On the 9th, on the 9th?
A. A similar period.
Q. Was this all during the day?
A. All during the afternoon.
Q. Between what hours?
A. After one o'clock.
Q. One o'clock to when?
A. Five, six, whatever time I stood there, I don't remember the time I stood there.

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Q. Was it ever beyond six o'clock?

A. Oh, yes.

Q. To what hour?

A. Eight, nine, ten, eleven o'clock some nights.

Q. You mean that you sat there from one o'clock to eleven o'clock at night taking down telephone conversations?

A. As they come in, yes.

Q. And did you not grow tired?

A. I beg your pardon?

[fol. 619] Q. You weren't tired?

A. If I was I didn't care.

Q. What?

A. If I was I did not care.

Q. You didn't care?

A. No.

Q. Were you sleepy?

A. I was not.

Q. You were wide awake?

A. Certainly.

Q. And on the next day, on the 10th, how long were you taking taps?

A. The same time, 5, 6 hours.

Q. You mean up to about ten o'clock at night?

A. I didn't say I was there every night until ten o'clock at night.

Q. I am asking you, on the 10th during what hours did you take taps?

A. I don't recall, it was some time in the afternoon, until I left the place, some time in the afternoon.

Q. And the 11th?

A. Same thing applies to the 11th.

Q. Between what hours?

A. In the afternoon, until five, six or seven o'clock, whatever time I left, I don't recall.

Q. On the 12th?

A. Same thing applies on the 12th.

Q. On the 13th?

A. Same thing applies on the 13th.

Q. Same thing applies on the 14th?

A. The 14th, the same thing applies.

Q. Don't you have to make out a time schedule at the Police Department between what hours you do certain work?

A. I do not.

Q. You do not?

A. No, sir.

Q. But isn't it a fact that you are not confining yourself to specific hours because you don't know what time these conversations came in and you want it to appear that you [fol. 620] were taking the taps?

A. I certainly know the time they came in, I have the time marked on each one of them.

Q. I understand, but I say, isn't it a fact that you don't want now to testify to the hours you put in each day on taps, because you are afraid that there might be a tap after those hours which you testified you took down?

A. I am not afraid, because I put the hours that I stayed there, that it was necessary for me to stay there.

Q. Now you did not have any voice training at all, or any training——

Mr. Monaghan: I object to that, your Honor.

The Court: Sustained.

Mr. Lowenberg: Exception.

Q. Was there anybody with you while you were taking these taps?

A. No, sir.

Q. It was done all alone?

A. Yes, sir.

Q. Did you have those notes in your possession at all times up to the date that you produced them in court?

A. No, sir.

Q. Where were they kept?

A. They were kept by the District Attorney, Mr. Monaghan.

Q. And you saw them the day before last for the last time?

A. The last time?

Q. Yes.

A. The day before last.

Q. And you made those corrections before you gave them to the District Attorney?

A. I made those corrections at the time I was at the tap.

Q. And before you gave them to the District Attorney?

A. Absolutely.

Q. Now, you mean you would wait until the conversation was over, and you would fill in certain words that you felt [fol. 621] needed filling in?

A. That is not right.

Q. You would wait until the conversation was over and then you would either clarify a word or add a word that was missing?

A. That is not right.

Q. Didn't you add the words, "even think"?

A. I did not.

Q. Didn't you a few minutes ago testify that the word "even" was left out and only the word "think" was written by you?

A. I did not testify to that.

Q. You did not testify?

A. No, sir.

Q. Didn't you testify that there was an erasure at that point "even think"?

A. I testified there was an erasure on the word "think", but not on the word "even", as you put it.

Q. Erasure, word "think"?

A. That's right.

Q. Was the word "think" left out of it by you?

A. It was not left out.

Q. Are these other erasures that were made by you, other words inserted, that was done after you got off taps?

A. While I was on the tap.

Q. But after the conversation was ended?

A. That's right.

Q. Then you sat down and you read through your notes, made erasures and inserted other words?

A. That is not right.

Q. You never inserted another word in its place?

A. I did not.

Q. You did not?

A. No.

Q At no time?

A. No.

Q. In how many cases would you say, Officer Jove, you have testified to wire tapping conversations?

A. About eight or ten cases.

Q. What?

A. About eight or ten.

[fol. 622] Q. Eight or ten?

A. Possible more.

Q. Well, how many more?

A. I don't recall the exact number.
Q. Were they a great number?
A. No.
Q. Were they—there were at least ten?
A. What?
Q. They were at least ten?
A. About that.
Q. In those other cases, did you also make erasures?
A. It is possible.
Q. What?
A. It is possible.
Q. Well, do you remember?
A. No.
Q. No?
A. No.
Q. You don't remember?
A. I don't remember.

Mr. Monaghan: Would you read that question to me, please?

(The Stenographer read the last question and answer.)

Q. When was the last time that you testified to wire tap conversations?
A. Sometime in October, 1946.
Q. Were there any erasures or filling-in of words in those wire tapping conversations?
A. There might have been.
Q. Don't you remember?
A. I do not.
Q. Have you still got those notes?
A. No, I haven't.
Q. When was the time before that that you took a wire tap conversation?

The Court: When he took it or testified?
Mr. Lowenberg: Took it and testified, Judge.

A. I took many.

[fol. 623] Q. When was the last time before that that you testified?
A. Sometime in July or August of 1946.
Q. Were there any erasures or substitutions of words in those wire tap conversations?

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A. There were no substitutions of words; there might have been erasures.

Q. Were there any erasures?

A. There might have been.

Q. Pardon me?

A. There might have been.

Q. You wouldn't deny there were not?

A. I would not say that there were none.

Q. Is it not a fact, Officer Jove, that it is your consistent policy in every wire tap conversation to substitute words that you think are necessary to fill out a conversation?

A. It is not.

Q. You have substituted words and made erasures in every one of the cases that you have testified in; is that right?

A. Not necessarily.

Q. Would you deny that you did not make any erasures in all those other cases that you have testified in?

A. No, I wouldn't deny that.

Q. And is it not a fact that you do that for the purpose of supplying what words you think are necessary?

A. Absolutely not.

Q. You wouldn't do that?

A. I certainly would not.

Q. You take pride in being an expert?

A. I take pride in being a policeman.

Q. That is right. You are every inch a policeman?

A. What was that?

Q. You are every inch——

The Court: Now, please.

Mr. Lowenberg: Withdrawn, Judge.

[fol. 624] Q. Now, I will show you People's Exhibit 5-O in evidence, the conversation as to December 13th at 7 P. M., and I see the word of "Harvey" at the end, and I will ask you, that was written in by you wasn't it?

A. That's right.

Q. When?

A. On that day.

Q. On that day?

A. Yes.

Q. Do you notice that the writing "Harvey" is different than the rest of the writing on that page?

A. That is my handwriting.

Q. Isn't the other your handwriting, too?

A. Absolutely.

Q. And you say that the word "Harvey" was written by you?

A. Certainly.

Q. And the rest of it was written by you?

A. Certainly.

Q. In other words, the entire handwriting on this page is in your own handwriting?

A. That is right.

Q. Do you see any dissimilarity between the "H" used there and the "H" used in the other place?

A. That's my "H", and the other place is my "H".

Q. You do not see any dissimilarity between the entire writing of "Harvey" and the rest of the language on that page, or words on that page?

A. "Harvey" was wrote at my leisure, the usual way I write. The other place was written fast, faster than I can write.

Q. The substitution of these words, or these erasures and re-writing of words were made at your leisure?

Mr. Monaghan: I object to the form of that question, your Honor.

The Court: Do not go over the same ground over and over, Mr. Lowenberg. There are two more lawyers who [fol. 625] want to cross examine this witness, and we haven't got too much time.

Mr. Lowenberg: Withdrawn, your Honor.

The Court: You have been at it now forty-five minutes.

Mr. Lowenberg: I cannot help it, Judge. He is an important witness.

The Court: Do not go over the same ground.

Mr. Lowenberg: I will try not to, Judge. I am sorry.

Q. Did you, in each instance, write at the end of the conversation, the name of the person who made the telephone conversation?

A. Not necessarily.

Q. You did it only in this one exhibit; is that correct?

A. In more exhibits.

Q. You did not do it in all?

A. Not in all. In the exhibits, yes.

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Q. In your original notes?

A. Yes.

Q. The conversation with both parties with whom it was held?

A. The conversation of those voices that I identified.

Q. In each instance that was made after you got off the wire at the end of the conversation?

A. That is right.

Q. Not while the conversation was going on?

A. No.

Mr. Lowenberg: That is all, Judge.

[fol. 626] Cross-examination.

By Mr. Segal:

Q. Mr. Jove, you have been talking to Mr. Monaghan about this case for how long?

A. Quite a few times.

Q. About how long have you been talking to Mr. Monaghan about this case?

A. I have been in his office for about five different days.

Q. Now, weren't you with him every single day ever since Paris went to trial?

A. No.

Q. Haven't you been with him every single day, doing nothing else but working on this case ever since that time?

A. No, sir.

Q. Now, you knew, didn't you, when you had listened in originally, that this was not the ordinary case that you had been intercepting; you knew that, didn't you?

A. I did not.

Q. However, you knew, didn't you, when you first started in to listen and overhear what was being said, that this was not the ordinary bookmaking conversation over a telephone?

A. Not necessarily. I didn't know anything else.

Q. You did not know anything else?

A. That's right.

Q. When did you first learn that this conversation had to do with football?

A. About three days afterwards.

Q. Three days after what?

A. Three days after I started to listen in.

Q. When was that?

A. December 5th.

Q. That would be December 8th?

A. No, the 8th was a Sunday. It must have been the 9th or 10th.

Q. You mean it would be about the 10th; is that right?

A. That's right.

Q. Now, of course, you told your superiors what you were [fol. 627] listening to, didn't you, right then and there?

A. Yes.

Q. Did you say to your superiors, "I think it would be wise", or did your superiors say to you, "I think it would be wise to have a 24-hour tap on these phones"?

A. He did not.

Q. Did your superiors say to you, or did you say to your superiors by way of suggestion, "I think we ought to have a stenographer there to take down every single word every time a call comes in or goes out"?

A. I didn't say anything. Nothing was said to me.

Q. Was a stenographer present either from the District Attorney's Office or from the Police Department?

A. There was not.

Q. You know that the Police Department does have stenographers?

A. Yes.

Q. And they have men stenographers, do they not, who record word for word what is said in the line-up; isn't that so?

A. That's right.

Q. And in the various hearings in the Police Department?

A. That's right.

Q. These men record word for word and not by handwriting, but rather by symbols, what is said; that is true, is it not?

A. I think so.

Q. You know that to be a fact, don't you?

A. I think so.

Q. And you know also that the District Attorney's Office has maybe 100 stenographers that take down what is said over a telephone or over a dictograph; you know that?

A. I know they have stenographers.

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Q. Now, you are acquainted with the Technical Laboratory of the Police Department, aren't you?

A. Yes.

[fol. 628] Q. And the Technical Laboratory of the Police Department has also recording machines, has it not?

A. I don't know.

Q. Now, you have heard of recording machines, haven't you?

A. Yes.

Q. And those recording machines record exactly the words that are used in the same language and the same tones, don't they?

A. Yes.

Q. You know that is one of the ways used by any investigating agency of the Government; you know that, don't you?

A. I do not.

Mr. Monaghan: I object to that.

The Court: Sustained.

Q. Have you heard about it, with all the experience that you have had?

Mr. Monaghan: I object to it, your Honor.

The Court: Allowed.

A. Yes, I heard of it.

Q. Didn't you see fit to say to your superiors, or did you- superiors suggest to you that such a device be set up in the office where you were listening and intercepting these phones?

A. No, I didn't say anything, and nothing was said to me.

Q. Now, of course, you had some assistants, didn't you?

A. No.

Q. Do you mean now that you are about the only one in the whole world that overheard these conversations, and that it is your word against anyone else who might say that you are not telling the truth; is that right?

[fol. 629] A. I am the only one that took the notes and overheard the conversations, that is true.

Q. Well, now, you mean that the Police Department, even after you told your superiors, did not put another person on the job with you?

A. They did not.

Q. And it is a fact, is it not, that most of the men who had done intercepting are more skillful in the intercepting than you because they have had many more occasions when they have intercepted wires; isn't that so?

A. I don't think so, Mister.

Q. Are you the one that holds the record for the number of interceptions?

A. I never look into that.

Q. Don't you know, as a matter of fact, that you have been merely an assistant to others who were more skilled in the field?

A. Absolutely not.

Q. Are you one of those who are supposed to be an expert?

A. Yes.

Q. Are you an expert?

A. In my way, I am.

Q. You are an expert?

A. I think so.

Q. And you have intercepted calls on twenty occasions over these eight years by yourself; is that right?

A. Possibly more.

Q. Well, I am going to borrow your own words. Didn't you say that you have intercepted on your own some twenty to twenty-five—on twenty or twenty-five occasions?

A. Yes.

Q. Were you telling the truth?

A. Certainly.

Q. You were not minimizing it, were you?

A. I might have been.

Q. You were minimizing?

A. I might have been.

[fol. 630] Q. You are not to know and understand that you are an expert?

A. Not necessarily.

Q. Well, you say you are an expert?

A. Yes.

Q. You are one of those experts that rarely ever makes a mistake?

A. I don't make any mistakes.

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Q. You said yesterday that you are sure of everything that you heard, and you could identify the voices on all occasions?

A. Not on all occasions.

Q. Not on all occasions?

A. No, sir.

Q. Now, when you overheard these telephone conversations originally, you did not know the names of the persons that were answering the telephones originally, did you?

A. I did not.

Q. How did you designate it? Whenever a call was made by Alvin Paris the first time and somebody answered some place, did you label it in your mind or on a piece of paper Voice No. 1, Voice No. 2? You didn't call it Pete, did you, you didn't call it Harvey at that time, did you?

Mr. Monaghan: I object to the form of the question.

Mr. Segal: I withdraw the question.

Q. You did not label these voices that you would hear that were entirely foreign to you; you had never heard them before; you did not label them voices No. 1, or No. 2? You didn't do that, did you?

A. Not the way you put it.

Q. Did you label it in any other way?

A. Yes.

Q. You had no names to go by?

A. I had some names to go by.

[fol. 631] Q. You did not have names mentioned on all occasions, did you?

A. No.

Q. And it was only because when a person on one end of the wire said, "Hello, Pete", or "Hello, Jerry", or, "Hello, John," it was then that you thought the other person at the other end must be John?

A. That's right.

Q. But if it was not mentioned, if the name was not mentioned, then you would label that voice, voice No. 1, 2, or what?

A. If the name wasn't mentioned, and the voice was that voice that I heard on the conversation when the name was mentioned, I certainly would recognize that voice in the conversation in which the name was mentioned.

Q. Are there some telephone conversations when you first started, when names were not mentioned at the other end of the wire?

A. Yes.

Q. It is true, then, that some telephone conversations, to begin with, had no names at all; is that right?

A. They all had names.

Q. Originally a man would call and say "Hello, this is Al," with no — mentioned on the other side?

A. Yes.

Q. That happened, didn't it?

A. Yes.

Q. What did you do with those conversations?

A. I have them here.

Q. What did you do with them, how did you label the persons that were answering?

A. If the conversation was important to what I was listening, I paid particular attention to the voices that I heard participating in the particular conversation.

Q. If it was important to what you wanted, is that it? In other words, you are wishing for something to be said [fol. 632] that you would consider important?

A. I wasn't wishing for anything.

Q. The wish was father to the thought, wasn't it, to you, whenever you are listening?

A. The wish was nowheres.

Q. Now, I ask you again, how did you label a call when Paris, you said, was making a call to some place uptown, how did you label the person uptown? How did you label him originally when no names were mentioned?

A. There were names mentioned.

Q. You said awhile ago there were occasions originally when no names were mentioned?

A. That's right.

Q. How did you label those names?

A. If the conversation was important, I paid particular attention to that conversation.

Q. Let us assume that you paid attention to it, and you did pay attention to it, how did you label the voice? Did you say, "This is John Jones", or "Henry Jones" or "No. 1 voice" or "No. 2 voice" or "The Mystery Voice"? How did you label it?

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A. I compared that voice in that conversation with the voice in another conversation in which the name had been mentioned.

Q. So you waited, did you not, Mr. Jove, until subsequently that a name was mentioned and you heard a voice, and then you began to remember, "That voice is like the voice I heard a few days ago"; is that right?

A. Not a few days ago.

Q. Or a day or two ago?

A. Not a day or two ago.

Q. The same day?

A. Possible.

[fol. 633] Q. Now, I asked you yesterday whether you have ever had any experience at all, or any training at all, in sounds, in voices, in phonetics, in rhythm, in timing; I asked you yesterday and you said you never had such training; is that right?

A. That's right.

Q. Now, in all of those conversations, when people were talking back and forth, would they talk slowly so that they would give you a chance to write it down?

A. They talked very carefully.

Q. What is that?

A. They talked very carefully.

Q. They talked very carefully?

A. In both parts.

Q. And that, I suppose, was for your benefit?

A. I don't know. It was for their own benefit, between each other's conversation.

Q. And you say they talked very carefully because the result, the net result, is that you were able to write down what they said; is that right?

A. It is not right.

Q. Well, you did write down what they said?

A. Yes.

Q. And when you told Mr. Lowenberg that you changed some of these things while you were taking these taps, I think you did add the words "probably the same day"?

Mr. Monaghan: I object to the form of the question.

The Court: Sustained.

Q. Did you say that?

Mr. Monaghan: Just a moment.

The Court: Sustained.

[fol. 634] Q. Did you say, in answer to one of the questions of Mr. Lowenberg, when he asked you, "When did you make changes"——

Mr. Monaghan: I object to the form of the question.
The Court: Objection sustained.
Mr. Segal: May I except?

Q. Do you remember Mr. Lowenberg asking you this question:
"Q. When did you make changes on your original notes?" and do you remember saying to him: "I changed them when I did while I was taking the tap conversation"——

Mr. Monaghan: Just a moment. I object to that question.

Q. I am not using your exact words.

Mr. Segal: May I finish, please, Mr. Monaghan?
Mr. Monaghan: All right.

Q. (continuing) Probably the same day. Did you say something amounting to that?

Mr. Monaghan: Just a moment. I object to that question.
The Court: Objection sustained.
Mr. Segal: May I except.

Q. Well, did you use the words meaning that you probably had made changes the same day?
A. I did not use that word.
Q. You did not say probably at all?
A. I did not.

[fol. 635] Mr. Segal: May we have the recorder go back, your Honor? May we have that last question and answer read?
The Court: He testified that he made some notes while the conversation was going on, and after the conversation was concluded he made some additional notes. Go on from there, and let us not waste time.
Mr. Segal: I ask your Honor to permit the recorder to read it.
The Court: The application is denied.
Mr. Segal: I except to your Honor's ruling.

Q. Mr. Jove, you say that you overheard a voice that you now identify as Krakower's because you heard it several times on the phone, and then later heard Krakower

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on the morning of December 15th, at which time you thought it was the same voice; is that right?

A. That's right.

Q. Now, on any of those occasions when you overheard, or when you claim you wrote these taps down, which reflect what you say Krakower said, did you ever hear Krakower say, "Give this player" or "that player a bribe"?

A. I did not.

Q. At any time did you hear him say, "Offer him $5,000", or "Offer him $2,500" or "Offer him $1,000"?

A. I did not.

Q. At any time did you hear him say, "Offer him a bribe"?

A. I did not.

Q. Now, you said yesterday that the reason you identified [fol. 636] the voice of Krakower is because it was what kind of a voice?

A. Strong, gruff voice.

Q. You have heard some people in this courtroom since you are on the stand; that is right, is it not?

A. Yes.

Q. How would you designate Mr. Lowenberg's voice?

A. As a very strong voice, to me.

Q. Was it rough?

A. No.

Q. Not rough—smooth, would you say?

A. Well, not smooth, but strong in sound.

Q. Strong?

A. That's right.

Q. Any other qualities or any other things you would say about it to describe it?

Mr. Monaghan: I object to it.

The Court: I will allow it.

Mr. Monaghan: I object to this line of questioning.

The Court: Overruled.

A. It is clear.

Q. Now, you said strong and very clear. What else?

A. And to me it denotes his education, that's all.

Q. To you it denotes his education, that is all?

A. Yes.

Q. That is the way you describe his voice?

A. Yes.

Q. You heard Mr. Monaghan speak?
A. Yes.
Q. How would you describe Mr. Monaghan's voice?
A. Mr. Monaghan has got a very strong voice, too, sharp.
Q. Sharp?
A. Yes.
Q. What else?
A. Sharp, strong voice. Same qualifications as the previous person.
Q. The same qualifications?
A. Yes.
[fol. 637] Q. You mean strong and sharp?
A. Strong and sharp, and it denotes——
Q. Good education?
A. Good education, and clearly spoken.
Q. What's that?
A. And the words are clearly spoken.
Q. The words are clearly spoken? Anything else?
A. That is all.
Q. Now, having mentioned those things about those voices, if you heard them on the telephone would you say the same things about them that you would say, that you say you think of them now since they spoke to you directly in the court room?
A. Yes.
Q. Would you say the same thing?
A. Yes.
Q. They reflect themselves on the telephone?
A. That's right.
Q. How would you describe Mr. Barshay's voice?
A. He has got a smooth voice, his voice is clear.
Q. Don't indulge in flattery, but just describe his voice.
A. His voice is very smooth, clear, very low tone of voice, and I stop there.
Q. You said his voice is low tone, smooth and clear?
A. Yes, and besides it denotes his education, too.
Q. Those are the qualities you give to his voice?
A. Yes, sir.
Q. You heard Mr. Cooper. You did not hear his voice, did you?
A. Some time ago I did.
Q. You did hear his voice?
A. Yes.
Q. How would you describe his voice?

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A. Very sharp, fast voice.
Q. Very sharp, what?
A. Fast.
Q. Very sharp, fast voice?
A. And strong.
[fol. 638] Q. What else?
A. I stop there.
Q. You have nothing else to say about his voice?
A. No.
Q. Now, with all the things that you have said about voices of people that we can call by name in this court room, do you say now that if you heard those voices on the phone and you heard them speaking, you could record what they were saying and come in here into court and say "This is an accurate transcription of what those persons said"?
A. I could not say that.
Q. And why is it that you could not say it in that case?
A. I could not say it is an accurate transcription of everything they say.
Q. Well, now, I am going to ask you about Krakower, do you say that that was an accurate transcription of what he said?
A. An accurate transcription of part of what he said, I missed——
Q. A part of what he said?
A. I missed things.
Q. What is that?
A. I missed words, sentences.
Q. You missed words?
A. Yes, I missed part of the conversation.
Q. You are frank in saying you did miss part of the conversation?
A. I did.
Q. While you were writing—I withdraw that. Is your schooling such—and I do not mean to pry into your life—have you had high school or college training, at all sir?
A. Not college.
Q. When your brain tells you to write and you are using your hands, receiving the telegraph from the brain to write, and your hand begins to write, do you say that your hearing [fol. 639] processes are operating very keenly at that time?
A. Yes.
Q. Now, when is it that you missed some words, while you were writing or while you stopped?

A. While the conversation is going on.

Q. You missed some words?

A. It is possible.

Q. And is it that you have recorded those words that you are hopeful would put Krakower in, and is it that you forgot or neglected or missed the words that would explain the rest of the conversation?

A. It is not.

Q. Is it that you were the judge of what was important to hurt Krakower in this case?

A. It is not.

Q. Well, you were looking for words that would hurt him, weren't you?

A. I was not looking for anything.

Q. Well, you were looking for things that would give you a chance to come forward to your superiors and say, "I have got a big thing"?

A. I wasn't looking for anything.

Q. Well, now, tell us, if you can, the substance of the words that you missed in Krakower's conversation.

A. The words I missed, I don't remember them.

Q. And the reason you don't remember is because your eye has never seen written down on paper what you thought you heard on the telephone, is that right?

A. I don't understand that question.

Q. All right, the only reason—I withdraw that. You don't even remember the tapped conversations, do you?

A. Not any particular one, but as a whole I remember them more or less.

Q. Well, tell us the first conversation—I withdraw that. [fol. 640] You have been over these tapped conversations time and time again, haven't you?

A. Not time and time again, I have been over them.

Q. Well, how many tapped conversations do you have altogether?

A. I don't know, I didn't count them.

Q. How many did you have altogether that you gave us yesterday, how many were there?

A. I don't remember how many.

Q. About how many, were there more than twenty?

A. I don't know.

Q. Well, now, you have been over these tapped conversations again and again with Mr. Monaghan, haven't you?

A. Not again and again, several times.

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Q. Several times?

A. Yes.

Q. And these things are pretty familiar to you, aren't they?

A. Yes.

Q. And tell us, on December 10th at any particular minute, tell us the conversation that you heard from, that is, tell us the conversation you heard dealing with any one of these three defendants without looking at your notes.

A. I don't remember.

Q. Is it, therefore, that the only thing that makes you remember is the fact that you have written on a paper what you did, is that so?

A. I don't remember them.

Q. You don't remember them at all?

A. No.

Q. Now, where were you sitting while you were taking these notes?

A. At a chair.

Q. Where?

A. And a table.

Q. Where were you tapping these, making a tap?

Mr. Monaghan: I object to that, your Honor, where the [fol. 641] taps were installed, I don't think it has any—without giving the name——

The Court: Confidential police information?

Mr. Monaghan: Yes.

The Court: Is it?

The Witness: Yes, it is.

The Court: I will sustain the objection.

Q. Were you in a basement?

The Court: I sustain the objection.

Mr. Segal: I am not asking for the particular location, Judge, I am trying to test the auditory ability——

The Court: You may ask if he had a table and a chair and earphones; I sustain the objection to the other thing.

Mr. Segal: I was only trying to show he was in a place where there may be other noises.

The Court: I am not depriving you of that, you may ask that.

Mr. Segal: I will ask if he was in a basement.

The Court: I sustain the objection to that.

Mr. Segal: I except.

Q. Were there any other noises?
A. There were none.
Q. Were you in a room that kept out noises from the outside?
A. I was.
Q. Were you in an apartment?

Mr. Monaghan: I object to it, your Honor.
[fol. 642] The Court: Sustained.
Mr. Segal: I except.

Q. Were you far away from where the wires were being intercepted?

Mr. Monaghan: I object to that as being——
The Court: Sustained.
Mr. Segal: May I have a moment, your Honor?
The Court: Yes.

Q. Mr. Jove, you heard Paris make a great many calls, didn't you?
A. I did.
Q. And you did not record all of the other calls, did you?
A. I did.
Q. Now, did he make any calls to men?
A. He did.
Q. I am not going to ask you about the calls made to women, but as to the calls made to men, did he mention to these men who answered the other end, did he mention their names?
A. He did.
Q. Did you record those names?
A. I did.
Q. Can you remember some of the names?
A. I do.
Q. Will you give us some of the names?

Mr. Monaghan: I object to it, your Honor.

Q. Other than the person mentioned here?

Mr. Monaghan: Irrelevant.
The Court: If it is anything connected with the issues in this case I will allow it, if it isn't I don't think you ought to go into it.
[fol. 643] Mr. Segal: I can't say to your Honor that it is or it is not, I think your Honor has an idea of who we con-

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tend the real persons were, the father and stepfather, and I am only asking now to see if it might clarify it.

The Court: That is a gratuitous statement, Mr. Segal.

Mr. Monaghan: I move to strike it out.

The Court: Strike it out.

Mr. Monaghan: And tell the jury to ignore it.

The Court: Yes. At recess you may talk to the District Attorney and this officer and I will direct him to give you the names and you may submit them to me and if I think they are germane to any of the issues in this case I will let you ask the question.

Mr. Segal: Very well, sir.

By Mr. Segal:

Q. Now, you have discussed these various other calls with Mr. Monaghan, haven't you?

A. We went over them.

Q. And when you went over them, why, you eliminated those that you were not going to use in this case?

A. I did not.

Q. The names of other persons?

A. I did not.

Q. Now, I don't mean, I am not, I don't mean any offense by it, but I mean what you did in this case, after you listened to the tapped wires was to bring into court those conversations which Mr. Monaghan thought were necessary to estab- [fol. 644] lish his proof, is that right?

A. That is not true, I have all the conversations right in front of me.

Q. You don't understand me, Mr. Jove, I am not accusing you of anything, but I ask you this, did you record any conversations coming from long distance into Mr. Paris' office?

A. I did not.

Q. You did not?

A. No, I did not.

Q. Wouldn't you receive a click on your wire that a call was coming in?

A. If it was coming in I would.

Q. And did you get a call coming in from California to Mr. Paris at any time?

A. I did not.

Q. You say you did not?

A. I did not.

Q. If I told you that Mr. Paris admitted here that he made a call or received a call from California on December 9th, would you say that it would not reflect your recollection?

A. It would not.

Q. So that you cannot give us any conversation in which you overheard a person calling from California to Mr. Paris' office and speaking to Alvin Paris?

Mr. Monaghan: Just a moment, I object, your Honor.

The Court: Sustained.

Mr. Segal: And may I except?

Q. Did you overhear any conversation at any time that week or in the week before, you say you were tapping from the 5th on, weren't you?

A. That's right.

Q. Did you overhear any conversations or did you plug in, or get any tapped conversations from California to New [fol. 645] York from a Mr. Eddie Ginsberg talking to Alvin Paris in New York during the week starting, or during the week in which you started to tap, December 5th?

A. I did not.

Q. Did you have any in the succeeding week after the Redskin game?

A. I have not.

Q. Now, there were occasions, were there not, when you did record a conversation of a man named Sidney Paris?

A. I did.

Q. And how many conversations did you record on that wire which were made by Sid Paris?

A. Quite a few.

Q. About how many?

A. I should say about five.

Q. And five over a period of how many days?

A. During the time I was on the tap.

Q. Can you give us the dates without consulting your records?

A. No, I cannot.

Q. Can you give us an idea how many days apart they were?

A. No, I cannot.

Q. Now, you had never seen Sid Paris before, had you?

A. I had not.

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Q. You had not seen him before—I withdraw that. When did you see Sid Paris the first time?

A. I don't remember the date, after Alvin Paris was arrested.

Q. How long after?

A. A few days after.

Q. A few days after?

A. About a week, yes.

Q. Where was that?

A. The District Attorney's Office.

Q. Did you then say to Mr. Paris, "You are Sid Paris, I heard your voice on the telephone"? Did you say that to him?

A. Eventually I did, yes.

[fol. 646] Q. Did you say that to him at the time that he came into the District Attorney's Office?

A. Not the first time I saw him.

Q. Did you say it to him the second time?

A. Yes.

Q. What was the occasion of the second time?

A. I was in Mr. Monaghan's room.

Q. When was that?

A. Some time after the first time I saw him.

Q. Well, we know that, but when was it?

A. I don't remember the date.

Q. How long after the first time?

A. A day or two after.

Q. A day or two after?

A. That's right.

Q. Was that, have you read the minutes of yesterday's trial, of yesterday's hearing?

A. I have not.

Q. Did you know what Sid Paris had testified to?

A. I do not.

Q. You knew that he took the stand?

A. I did.

Q. And you knew that a certain conversation was had?

A. I did not.

Q. Now, did you know what he was asked, at all?

A. I do not.

Q. Now, on the occasion of the second time when you saw Sid Paris in Mr. Monaghan's office, was this an occasion

when he was being questioned by the police officers and Mr. Monaghan?

A. It was not.

Q. Was this an occasion where you were questioning him alone?

A. I never questioned him alone.

Q. Well, what was the occasion on which you said to him, "I know your voice, you are Sid Paris, I heard you on the [fol. 647] telephone"?

A. Sid Paris was talking to Mr. Monaghan. Mr. Monaghan called me in the room and asked me certain things and I then told Sid Paris, I said, "You are the man that I heard over the phone."

Q. You mean Mr. Monaghan brought you in while he was talking to Sid Paris?

A. That's right.

Q. And in the presence of Sid Paris he said to you. "Tell us what you heard Sid Paris say over the phone," is that right?

A. No.

Q. Did he say something amounting to that?

A. He said, "Tell Sid here what you told me."

Q. "Tell Sid here what you told me"?

A. That's right.

Q. And did you then tell Mr. Paris what you told Mr. Monaghan before?

A. I did.

Q. Did Mr. Paris deny that he said anything?

A. He did.

Q. Did he say "You're a liar"?

A. He did not.

Q. He said merely that, "I did not, that is not so," is that right?

A. Yes.

Q. That is what he said?

A. Not to all of them.

Q. What?

A. To certain conversations.

Q. To certain conversations?

A. Yes.

Q. Did he say that he did make other conversations?

A. Yes.

Q. Did he say—I refer you to December 13th—I withdraw that.

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Did you say to him, "I heard you on December 11th or December 10th," did you say that to him?

A. I don't remember the particular date I said to him.

[fol. 648] Q. How many dates?

A. But I did say to him in reference——

The Court: I don't want to curtail you, Mr. Segal.

Mr. Segal: I am not going to be much longer.

The Court: You listen.

Mr. Segal: I will listen.

The Court: Instead of your telling the witness what he said, bring out the testimony which you think is essential, and get to the point. It is a question of the credibility of a witness who has taken the stand, anyway.

Mr. Segal: I will do whatever you say.

The Court: Well, I am directing you to do so.

Mr. Segal: Very well, sir.

Q. What did you say to Paris, now, tell us?

Mr. Monaghan: I object to it, your Honor, it is on a collateral matter, and I think it is irrelevant.

The Court: He has already testified to what he said to Paris, and Paris admitted making certain conversations. Go on from there.

Q. Now, did you say to Paris, "I heard you say"—in answer to Mr. Monaghan's direction, did you say to Paris, "I heard you say on December 13th at 3:30 P. M."——

Mr. Monaghan: Just a moment, your Honor.

[fol. 649] Mr. Segal: May I finish the question, Mr. Monaghan?

Mr. Monaghan: It is collateral, and I object to it, it is obvious what he is doing and I object to it.

The Court: I am going to allow it. Now, get to the point and let this officer testify and don't you testify, Mr. Segal.

Mr. Segal: I thought I had the right of cross-examination.

The Court: Get the date and information, do it the way I tell you to.

Mr. Segal: Very well, sir.

Q. Did you say this to Mr. Paris at the time, "I heard you say the following, the incoming call saying, 'Jay May Co.', the outside person saying,—or the inside person say-

ing, 'Jay May Co.' The outside person saying, 'Is Alvin there?' and the inside person saying, 'No, he is not in just now, who is this?' "

Mr. Monaghan: Your Honor, I object again, I press my objection. It is on a collateral matter.

Mr. Segal: I am reading the whole conversation, and I am through after that.

Mr. Monaghan: I say it is on a collateral matter and I press my objection, your Honor.

The Court: It is already in the case twice, I will let this witness testify as to whether or not Mr. Paris admitted making that telephone conversation, and that is what you are trying to ask this witness.

Mr. Segal: That is right.

[fol. 650] The Court: Well, you could ask him in one simple question instead of taking ten minutes.

Mr. Segal: I am putting in the nature of questions, your Honor, it is just that I have to lead up to it so the jury is not confused as to which conversation it is.

The Court: Do not underestimate the jury, Mr. Segal; they know what is going on.

Mr. Segal: I appreciate that, your Honor.

Q. Now, did you say to Mr. Paris, "I heard you say 'Call him back between 7 and 7:30, we may have some info for you' "? Did you say that to Mr. Paris in the presence of Mr. Monaghan?

A. Is that the full conversation?

Mr. Segal: Well, the Judge is not permitting me to give you the full conversation.

The Court: Will you give me those two conversations mentioned in the case yesterday, have you got them there?

Mr. Segal: I have got them there.

The Court: Let me have them, please. Have you a copy of the transcripts of those conversations referred to when Mr. Sidney Paris was on the stand?

Mr. Monaghan: Yes.

The Court: Look at these two conversations.

Mr. Segal: Your Honor, in deference to your Honor, I consider this phase very important. I would like to put [fol. 651] the questions in my way and I do not think I would

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delay the Court. I will be through as soon as I put the questions.

The Court: You have taken too long on this phase of the examination. I am ruling, I am cutting it short. This is a collateral matter.

Mr. Segal: I except.

The Court: You have an exception. Look at these two conversations and I want to know whether Mr. Paris admitted making either one or both?

Mr. Segal: May the record know what you are referring to, your Honor?

The Court: He will read the one which he refers to.

The Witness: I called Sidney Paris's attention to the one at 3:40.

Mr. Segal: Talk a bit louder.

The Witness: The conversation, an incoming call, at 3:30 P. M., on December 13th, I called his attention that that was his voice and that he had made that conversation over that telephone.

The Court: What did he say?

The Witness: He said "Yes."

The Court: Read the conversation.

The Witness: Incoming call, December 13th, 1946—3:30 P. M., inside voice said, "Jay Manufacturing Co." That was the voice of Sidney Paris, and the outside voice said, "Is Alvin there?" I do not recognize that voice. The inside voice, Sidney Paris, said, "No, he is not in just now, [fol. 652] who is this?" The outside voice said, "This is Hal."

Q. Would you say that louder, please?

A. "This is Hal, where is he, in Jersey?" Sidney Paris said, "No, he is not in the city just now, he went over to Bear Mountain." The outside voice said, "What is he doing up there?" Sidney Paris said, "Don't you know, he went up to mount the bear." The outside——

Q. Went up to what?

A. "To mount the bear."

Q. "To mount the bear"?

A. That's right.

Q. Yes?

A. The outside voice said, "Mount the bear, what do you mean?" Sidney Paris said, "The boys are up there." The

outside voice said, "Oh, I get it, I know what you mean now." Sidney Paris said, "Call him back between 7 and 7:30 P. M., he may have some good information for you." The outside voice said, "O.K., I will call him."

The Court: The other conversation, did he deny making, the one above it?

Mr. Segal: That is the one below it. Oh, I don't know how it is on that page.

Mr. Monaghan: I think it is the one below, your Honor.

The Court: Did he admit making any other conversations that you question——

The Witness: He did.

The Court: He did admit making some other conversations?

The Witness: Yes.

The Court: Have you those here, Mr. Monaghan?

[fol. 653] Mr. Monaghan: Well, I really don't know which ones he admitted, I know that he did admit——

The Court: Which one did he refer to yesterday?

Mr. Monaghan: This one here.

The Court: Take a look at this. Did he admit making that conversation?

The Witness: Yes.

The Court: He admitted making that conversation?

The Witness: Yes.

The Court: You may read it.

The Witness: 3:45 P. M., the same date, December 13, 1946, inside voice, "Jay Manufacturing Company." Sidney Paris, outside voice, Harvey Stemmer, the defendant, "Where is Alvin?" The inside voice, "Up there, got an in with one of them." The defendant Stemmer, "That is what he told me yesterday." Sidney Paris said, "I know, but this is good, must meet another one." Harvey Stemmer said——

Q. Is that "must meet another one"?

A. "Must meet another one." Harvey Stemmer said, "How does it look?" Sidney Paris said, "A sure thing." Harvey Stemmer said, "O. K., old man, I will call later."

The Court: Go on from there, Mr. Segal.

Mr. Segal: May I now ask Mr. Monaghan to turn over to us the other conversations by Sidney Paris.

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The Court: I will look at them and if they are germane to the issues I will let you see them.

[fol. 654] Mr. Segal: That is all I have with this witness.

Mr. Lowenberg: May I have just two minutes with this witness, please?

The Court: What is that?

Mr. Lowenberg: May I have two minutes? I want to ask half a dozen questions.

The Court: Just take your time, you will have another opportunity.

Mr. Lowenberg: All right.

The Court: Are you going to be long?

Mr. Barshay: No, sir.

Cross-examination.

By Mr. Barshay:

Q. Mr. Jove, a person's voice changes many times during the time, depending upon his mood, doesn't it?

A. Yes.

Q. In the morning he may have a morning voice, correct, or before he has breakfast or washes his teeth?

A. That's right.

Q. In the afternoon, if he is joyful, he may sound differently?

A. He may.

Q. Or if he is sad he may sound differently?

A. He may.

Q. If he wins a bet he may sound joyful, if he loses he may sound sad, is that right?

A. That's right.

Q. It also depends upon the inflection of a person's voice as he speaks over the telephone, doesn't it?

A. Yes.

Q. For example, a man may use the word—withdrawn. He may say something which may sound like a question and may say something which may sound like a statement, and [fol. 655] he may say something which may—for example, Mr. Jove, a man may say, "I stole a hat?" That is a question, isn't it?

A. Yes.

Q. That has one meaning, doesn't it?

A. Yes.

Q. But if he says, "I stole a hat," that has another meaning, hasn't it?

A. Yes.

Q. One he is asking and one he is admitting, is that correct?

A. That's right.

Q. Now, the spelling of a word may change the meaning of a sentence, doesn't it?

A. Spelling of a word?

Q. Yes, for example, if a person uses the word "No" on the telephone and you write "N-o", and if he uses the word know on the telephone and you write "K-n-o-w", it may change the meaning of a sentence, is that so, sir?

A. Certainly.

Q. Did you have a permanent book in which to record these interceptions?

A. A what?

Q. A permanent book?

A. No.

Q. You just had these sheets?

A. I had a pair of these, yes.

Q. No permanent ledger was ever furnished to you so that the Police Department could have a permanent record?

A. No.

Q. So that you could substitute sheets, loose sheets, could you not?

A. No.

Q. Well, if you lost these sheets the evidence would be gone, it is obvious, isn't it?

A. Oh, yes, if I lost this, yes.

Q. So you could drop one sheet, could you not, by mistake, it is possible, isn't it?

A. It is possible, yes.

Q. Now, the conversations you attribute to Zarowitz were five, and as you said yesterday——

A. That's right.

[fol. 656] Q. That is after careful checking?

A. That's right.

Q. There are no more, there are no less?

A. That's right.

Q. And each of the conversations you attribute to Zarowitz are contained in the transcripts now offered in evidence?

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A. I think so.

Q. What I mean to say is——

Mr. Monaghan: One of them was not in evidence.

Q. Well, whatever is in evidence, Mr. Zarowitz, contains the full conversation that you now attribute to Zarowitz, you did not leave anything off, did you?

A. I don't know whether they are all in evidence or not.

Q. Well, whatever is in evidence contains the whole conversation that you put down, nothing less, isn't that clear to you?

A. I say I don't know whether all of the conversations that I took down are in evidence.

Q. Maybe you don't understand me.

A. It is possible.

Q. For example, on a certain day you say you intercepted a conversation which you attributed to Zarowitz and you wrote everything down on a piece of paper?

A. That's right.

Q. And that piece of paper is now in evidence, is that clear, if it is in evidence?

A. If it is, yes.

Q. You did not leave anything off that piece of paper, did you?

A. Not off that piece of paper.

Q. You haven't any other sheets which add or change the meaning of the particular sheet you offered in evidence, or Mr. Monaghan?

A. No.

[fol. 657] Q. That is what I want to know. Now, you wrote as the people spoke on the telephone, is that correct?

A. That's right.

Q. You don't write as fast as this gentleman, the stenographer, do you?

A. He is not writing.

Q. What?

A. He is not writing.

Q. I say, you don't write longhand as fast as he uses the stenotype?

A. I don't think so.

Q. You could not do that, could you?

A. No.

Q. It is impossible?

A. Yes.

Q. Now, in advance on these pieces of paper did you have filled in the words "time, incoming, outgoing, incoming, outgoing," did you?

A. No.

Q. So you had to write all these things down?

A. That's right.

Q. You had to look at the watch?

A. Yes.

Q. You had no names put in at all before they began to use them?

A. No.

Q. And all that took time, didn't it—well, withdrawn. You wrote as they spoke?

A. That's right.

Q. Sometimes they spoke faster than other times?

A. That's right.

Q. Sometimes you could not write as fast as they spoke?

A. That's right.

Q. Sometimes people speak at the same time?

A. That's right.

Q. Then you don't know what to put down, do you?

A. I don't put nothing down.

Q. You leave it out altogether?

A. That's right.

Q. And what you left out may change the meaning of the sentence or the entire conversation, isn't that so?

A. I don't know.

Q. It is possible, isn't it?

A. It is possible, yes.

[fol. 658] Q. Now, you said yesterday that when you could not write as fast as they spoke, after they hung up, you then used your memory to fill in what you thought was said on the telephone?

A. What was said on the telephone.

Q. Isn't that so—now, assuming, sir, that while you were writing that the telephone rang again, you would pick it up, wouldn't you, you would not wait until you finished your writing, you would pick it right up?

A. It did not happen while I was there.

Q. What?

A. But I would have picked it right up.

Q. Sure, you did not want to miss anything, isn't that so?

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A. Yes.

Q. So that the conversation previously remained unrecorded because you were now beginning to take the next one?

Mr. Monaghan: I object to that, your Honor, he testified it did not happen.

The Court: Did that happen?

The Witness: It did not.

Mr. Monaghan: He just testified to that.

Q. It did not happen?

A. It did not happen.

Q. What?

A. It did not happen while I was on this tap.

Q. Now, all the conversations, sir, that you claim that you overheard, did you ever hear Mr. Zarowitz say to anyone, "Go ahead and offer Hapes and Filchock any money"?

A. No.

Mr. Barshay: That is all.

Mr. Lowenberg: May I just have half a dozen questions, please, I will be through in two minutes.

[fol. 659] The Court: Yes.

Mr. Lowenberg: Will you let me have those others in evidence, are those in evidence?

The Witness: No.

The Court: We will take a short recess now. Remember not to talk about the case and not to form any opinion.

(There was a short recess.)

(After a short recess the trial was resumed.)

By Mr. Lowenberg:

Mr. Lowenberg: I will be very brief.

Q. I think you testified, Officer, that at the end of each telephone conversation you would then write the name of the person you heard on the wire, for example, "Harvey" or "Sid" or "Al"; is that correct?

A. Not at the end of every tap.

Q. At the end of every tap?

A. No.

Q. When would you write it?

A. After a certain date, two or three days after the tap,

but even from the very beginning, I write it as the tap is finished.

Q. It is safe to say that within three days after the tapped telephone conversation, and not any more than that, you would write on the notes that you have made "Harvey" or "Sid" or "Al"; is that correct?

A. No, only one name.

Q. One name, "Harvey"?

A. That is correct.

Q. And you did that in every instance in every tapped telephone conversation; is that correct?

A. I did not.

[fol. 660] Q. You did not. When did you write the others?

A. After a certain — I wrote it as the conversation was finished.

Q. I know, but what I am driving at, Officer Jove, is just this: Is it safe to say it was no more than three days after the tapped conversation that you wrote the name "Harvey", for example?

A. For the first time, yes.

Q. You never wrote the name "Harvey" at any time after three or four days after the tapped telephone conversation?

A. After the first time I wrote the name "Harvey", no.

Q. And you mean by that Harvey Stemmer; is that correct?

A. I meant Harvey. I don't know who he was at the time.

Q. Well, now, let me see. There are taps here in which the name of Harvey is not used; correct?

A. That's right.

Q. Did you write the name of Harvey then?

A. Yes.

Q. So that the name "Harvey" was not used in those taps; correct?

A. It was used in some taps, not in all of them.

Q. In how many taps was the name "Harvey" used?

A. Three or four.

Q. How many taps did you take of all that you claim, of Harvey's conversations?

A. Twenty-six.

Q. In those others, the rest of them, the name of Harvey was not used?

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A. It was used in six, about.

Q. Did you ever write the name "Harvey" at the end of a tapped conversation when the name of Harvey had not appeared?

A. Yes.

[fol. 661] Q. That is what I am driving at. So that in other tapped conversations, where the name Harvey did not appear and was not mentioned, you wrote at the end of the tapped conversation, or within three days thereafter, the name of Harvey; correct?

A. I wrote the name of Harvey, if the conversation pertained to Harvey.

Q. Even if the name of Harvey was not used in the conversation?

A. That's right.

Q. That is what I mean. That was no more than three days after the tapped telephone conversation?

A. That was on one occasion three days after.

Q. That was the latest?

A. That was the first time.

Q. Did you ever write the name of Harvey at the end of any conversation where the name of Harvey was not used in the conversation?

A. Yes.

Q. At any time after three days following the conversation?

A. Yes.

Q. When was the longest time?

A. No more than three days.

Q. No more than three days. That is what I mean.

A. That's right.

Q. Now, Officer Jove, you did not speak to Harvey for five weeks after the tapped telephone conversations, did you?

A. That's right.

Q. You did not hear him talk for five weeks after the last tapped telephone conversation; correct?

A. That's right.

Q. How can you then write the name of Harvey at the end of any of those tapped telephone conversations when his name was not used, if you did not hear him talk for [fol. 662] five weeks thereafter?

A. Because his name was used during the conversations on the telephone that I was tapping. He identified himself.

Q. Wait a minute, now. As a matter of fact, there was only one tapped conversation in which the name of Harvey was used. That was when he called Mrs. Paris; is that correct?

A. That was the first one.

Q. On any other occasion, was the name Harvey used?

A. That is not right.

Q. Can you point out where the name Harvey was used?

A. Yes.

Q. By Harvey?

A. By Harvey, no.

Q. So that in no other conversation was the name Harvey used by Harvey except when he called up Mrs. Paris once?

A. That's right.

Q. So that you assumed by somebody else calling the other person Harvey, that it must be the same Harvey that had called up Mrs. Paris; correct?

A. Wrong.

Q. What did you assume it from?

A. It was the same voice.

Q. How long did the conversation with Mrs. Paris take, one minute?

A. Maybe less than that.

Q. Maybe less than that. Thirty seconds?

A. It's possible.

Q. And it was on that thirty-second conversation, from then on you constantly wrote the name of Harvey; correct?

A. I heard the same voice before.

Q. Before Mrs. Paris?

A. Yes.

Q. How long did the conversation take with Mrs. Paris; thirty seconds, correct?

A. Yes.

Q. Didn't you think, in justice, or fairness, that you should withhold the writing of the name of Harvey until [fol. 663] you heard Harvey's voice, Harvey speak himself, in person?

Mr. Monaghan: I object to that.

The Court: Sustained.

Mr. Lowenberg: Exception.

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Q. You had not heard Harvey speak in person at any time before you wrote the name of Harvey at the end of those tapped conversations?

A. No.

Mr. Lowenberg: That is all.

Mr. Segal: May I, in behalf of Krakower, at this time put this man to a test by reading some material, from any printed piece of material, so that we could get——

The Court: Read what?

Mr. Segal: I should like, on behalf of Krakower, to read something to this witness, to put him to a test, to see whether or not he can record what this man read at the normal rate of speed.

Mr. Monaghan: Your Honor, I object to any such test, unless it would be taken under similar circumstances when he was taking the notes. Obviously at that time 250 people were not watching him. He was not on the witness stand. He was there where it was quiet. I object to any such test.

The Court: I sustain the objection.

Mr. Segal: May I except, your Honor?

[fol. 664] Redirect examination.

By Mr. Monaghan:

Q. Jove, from the time you started in school as a young boy around six years of age, I presume——

A. Yes, sir.

Q. —what language was taught in the schools, what was the language of the school?

A. English.

Q. And it was for arithmetic, algebra, English, spelling, history, geography, all were in English; is that correct?

A. All subjects, except Spanish.

Q. All the subjects you took were in English, and the teachers all talked English?

A. Yes.

Q. The English language was the prevailing language where you went to school and lived; is that correct?

A. Yes.

Q. In your work as a police officer, is the salary which you receive higher than the salary of others in your department?

Mr. Lowenberg: Objected to.

The Court: Sustained.

Mr. Monaghan: Your Honor, I think the door was opened, so in view of the questions asked on cross examination——

Mr. Lowenberg: I object to any argument in front of the jury.

The Court: We are not interested in that.

Q. At any time when you took these notes, did you alter them in any way?

A. I did not.

Q. Did you leave out anything with the intention to hurt anybody?

A. I did not.

Q. And did you add anything with the intention to help make a case?

Mr. Segal: I object on the ground what he testified to is [fol. 665] a conclusion on his own part, as to whether or not it would hurt anybody.

Mr. Lowenberg: And on the further ground, Judge, it calls for the operation of this witness's mind, and as to his intent.

The Court: In view of the cross examination, I will allow the question.

Mr. Lowenberg: I except.

Mr. Segal: I except.

Q. Did you alter anything to hurt anybody?

A. I did not.

Q. Did you add anything or alter anything to help make a case against anybody?

Mr. Segal: Objected to on the ground it has already been answered, if your Honor pleases.

The Court: I will allow it.

Mr. Segal: I except.

A. I did not.

Q. And when you made these erasures, will you explain to the Court and jury just what you did and the purpose of so doing.

Mr. Segal: That is objected to on the ground it has already been answered, if your Honor pleases.

The Court: I will allow it.

Mr. Segal: Exception.

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A. There is words that as I am writing——

Q. Let us take any exhibit at random there, People's Exhibit 5-M. Is that there?

A. M?

[fol. 666] Q. Any one. What is the first one? 5-N in evidence, is that the complete exhibit?

A. Yes.

Q. Will you hold it toward the jury and show them exactly what you did, and speak loudly so that they can hear you?

A. There's the word "go", so as I wrote, while taking the conversation on the phone, it didn't come out clear, so I put the very same word over it in heavy pencil.

Q. To clarify it?

A. To clarify it.

Q. Is there any erasure on that?

A. There is no erasure on this.

Mr. Monaghan: May I show this to the jury?

The Court: We will show them all to the jury at the proper time.

Q. Take People's Exhibit 5-O. Will you explain to the jury, holding it toward the jury, and pointing it out——

Mr. Lowenberg: I object, if your Honor please, on the ground that your Honor directed me not to show it to the jury. He is trying to circumvent your Honor's ruling by having the witness show it to the jury and point it out as an exhibit. It is not fair.

The Court: When there is a recess, with the consent of the defendants, I will show the exhibits to the jury.

Mr. Lowenberg: I submit at this time it shouldn't be done that way.

The Court: It is of no consequence. I will allow it.

Mr. Lowenberg: I except.

[fol. 667] Q. Explain to the jury what occurred?

A. The first word is the word "induced." As I wrote it, it didn't come out clearly, and I erased—not heavily—on the original word, but lightly, and I wrote the word "induced" over it.

The next one is the word "friendship." The word is a little long, and when I wrote it, I broke it down, and it didn't appear clear for somebody else to read. I also erased, and

as it is now, the first word appears in there, and over that I wrote the word "friendship."

The next one is the word "what."

Q. Point it out to them.

A. I just added over the last two letters "at," and I pronounced the "at," leaving the "wh" as it was originally.

The word "might" I wrote over my writing and made it clearer.

The Court: We have enough on that.

Q. Wherever there is an erasure or heavy pencil mark, was that for the purpose of bringing out the same word which might have been partly spelled or unclearly spelled.

Mr. Cooper: Objection, if your Honor please. I object to the form of the question.

The Court: He already testified about all of that.

Q. How many times have I gone over this case with you for trial or any other purpose?

A. About four or five times.

Q. And that included the Paris trial and the Grand Jury; is that correct?

[fols. 668-854] Mr. Segal: Just a moment. Is Mr. Monaghan testifying, or is the witness being asked a question?

Mr. Monaghan: Are you asking me, or directing your remarks to the Court?

Mr. Segal: I am directing my remarks to you as well.

The Court: I will allow it.

Mr. Segal: I except.

A. Yes, that includes that.

Q. The Grand Jury and the Paris trial and the preparation for this trial?

A. That's right.

Mr. Monaghan: That is all.

[fol. 855] CHARGE OF THE COURT

(STREIT, J.:)

The Court: It now becomes my duty to instruct you as to the principles of law involved in this case.

First, I desire, on behalf of the county and the State, to thank you most profusely for the sacrifice you have made

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[fol. 856] and for the attention you have given to this case, with never a suggestion of the irksomeness attendant upon a matter of this kind.

I desire to commend the District Attorney for his conscientious efforts in this case, in his preparation of the case, and to commend counsel for their efforts on behalf of these defendants, and the courteous and able manner in which they have defended these defendants.

Now, ladies and gentlemen, you should consider the statements and comments, and the arguments made by counsel on either side based on the evidence, but you must disregard any statements or any comments or any arguments of counsel which are not supported by the evidence, and you must disregard any remarks which may have come out in this case which are of a personal nature.

The fact that the Court has denied motions from time to time by defendants' counsel, and the rulings of the Court upon objections, are not to be taken by you as any expression or opinion on the part of the Court upon the facts of this case, but must be regarded by you only as rulings upon the law, concerning which you have nothing to do.

The denial of any motions to dismiss the indictment made at the close of the case is not to be taken by the jury as any indication that the Court has formed any opinion regarding the guilt or innocence of any of the defendants. It simply is an indication that the Court feels that there is a question of fact which only the jurors can pass upon.

[fol. 857] In the introduction of evidence each defendant had the right to contest the case of the prosecution step by step, and to dispute every theory and fact advanced against him.

All offers of counsel on either side to prove things which were not proved, or which were not permitted to be proved by the Court, and all arguments of counsel addressed to the Court upon questions of law should and must be disregarded by you.

The answers of witnesses which were stricken out, or matters which were not permitted to go into evidence, and which you were instructed to disregard, should and must be disregarded by you and given no weight or consideration at all in your determination of the guilt or innocence of any of these defendants. You are to consider only matters which were legally admitted in evidence.

As you know, you are the exclusive judges of the facts

in this case, and you are sitting here as judges the same as I am, and in that capacity you will decide the facts cooly, calmly, deliberately and without fear or favor or passion or prejudice.

On the other hand, you must accept the law from the Court as I give it to you. It is necessary to the proper administration of justice that you do not question any principle of law which I lay down for your guidance. You will then apply the law as I give it to you to the facts as you find them, and in that manner arrive at a verdict of guilt or innocence.

It is the duty of each juror, while the jurors are deliberating upon their verdict, to give careful consideration to [fol. 858] the views and to the opinions of his fellow jurors. A juror should not stop his ears and stubbornly stand on a position he first takes, regardless of what might be said by the other jurors. You should discuss the case together and compare views and reasons, and before you make up your verdict each juror, without reference to the others, should be satisfied in his own mind of the guilt or innocence of each defendant.

It is the duty of each juror to reason with his fellow jurors with an honest desire to arrive at the truth, and with a view to ultimately arriving at a verdict either for the People or for each defendant. It is your duty to agree upon a verdict if that be possible, without a violation of your conscientious convictions and scruples.

As I said, all questions of fact are left to your exclusive determination. And as the judges of the facts, you are also the judges of the credibility of the witnesses. It is for you to say which witness has told the truth and which witness has testified falsely.

If you believe that any witness has wilfully testified falsely to a material fact in this case, you have the right to disregard his or her entire testimony, or you may believe so much of it as you deem true and disregard so much as you deem false.

You should endeavor to reconcile the testimony if you can. In determining what weight or credence you will give to the testimony of any witness, you may take into consideration any interest a witness has in the outcome of the case, or any bias for anyone or prejudice against anyone he may [fol. 859] display in giving testimony on the witness stand.

In connection with the testimony of the witness Alvin

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Paris, you may take into consideration any reward or hope of reward, or any consideration he thinks he may receive in giving testimony on the witness stand, or any interest he may have in the outcome of the case.

It appears that the witness Alvin Paris and the witness Sidney Paris have each been convicted of crime. The witness Alvin Paris has been convicted of the crime of bribing these two football players, and the witness Sidney Paris has been convicted of using the mails to defraud.

The fact that a witness has heretofore been convicted of a crime does not disqualify him as a witness. He is competent to testify, but it may affect his credibility, it may affect the weight which you will give to his testimony, and it is always for a juror to say how much weight and how much credence he will give to the testimony of a witness who has heretofore been convicted of a crime or crimes as hereto testified.

Now, each defendant is presumed to be innocent until he is proven guilty, and that presumption rests with the defendant throughout the trial, until the moment the jurors are convinced from the proof submitted to them that he is guilty of the crime or crimes charged. Then the presumption of innocence is destroyed.

The burden of proof is upon the People to establish every element of every crime of which each defendant is charged to your satisfaction and beyond a reasonable doubt.

There is nothing mysterious about the words "reasonable doubt." A reasonable doubt means a doubt based upon [fol. 860] reason, a doubt for which a juror could give a reason if called upon in the jury room, based upon the evidence or lack of evidence in this case.

Now, a reasonable doubt does not mean a whim, nor is it a guess, nor is it a surmise, nor is it a subterfuge to avoid doing a disagreeable duty. As I said, a reasonable doubt means a doubt based upon reason.

So that if, after reviewing all of the evidence in this case, you have such a reasonable doubt as to the defendant's guilt, or of any of the crimes with which a defendant is charged, it is your duty to acquit such defendant of such crime of which you have such a reasonable doubt.

A reasonable doubt has also been defined as an honest doubt based upon the evidence in the case or the lack of satisfactory proof in the case, a doubt which leaves a juror's mind in a state of suspense so that he cannot say

that he is convinced to a moral certainty of the defendant's guilt, but if a juror is convinced beyond a reasonable doubt and to a moral certainty as to his guilt, as I said, it is just as much your duty to convict.

Now, do not consider the question of punishment in the jury room. The statute fixes that responsibility upon the Court. It is the exclusive province of the Court, so please do not talk about punishment in the jury room.

Bearing in mind that an indictment is not evidence of the defendant't guilt but an accusation in writing by the Grand Jury accusing a defendant or defendants of a crime or [fol. 861] crimes, the defendant Stemmer now stands indicted before you of three distinct crimes, two crimes of bribery, one under the first count of the indictment and one under the second count of the indictment, in which he is charged with participating in the bribing of two professional football players, and under the third count of the indictment Stemmer is charged with the crime of conspiracy.

The defendant Krakower stands indicted before you of one crime of bribery under the second count of the indictment, the Filchock count, and the crime of conspiracy under the third count.

And the defendant Zarowitz stands indicted before you of one crime of bribery under the second count of the indictment, the Filchock count, and the crime of conspiracy as charged in the third count of the indictment.

Now, under the first count of the indictment the defendant Stemmer is charged with bribing a participant in a professional football game, in violation of Section 382 of the Penal Law, and there it is alleged that one Alvin Paris, in the County of New York, from on or about December 9, 1946, to on or about December 11, 1946, promised and offered a professional football player, that is, Merle Hapes, a member of the New York Football Giants, the sum of $2,500 in United States currency, and a bet and wager for the benefit of Hapes in the sum of $1,000 with intent to influence said Hapes to lose and try to lose and cause the game to be lost between the Chicago Bears and the New York Giants to be played on December 15, 1946, in which game Hapes was to be a player and participant.

[fol. 862] And the defendant Stemmer, in the commission of the bribery by Alvin Paris, in the manner aforesaid, it is charged was concerned in and aided and abetted said

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Alvin Paris, and counselled, commanded, induced and procured Alvin Paris to commit said bribery and felony. That is, the defendant Stemmer is charged with aiding and abetting Alvin Paris in the bribery of Merle Hapes under the first count of the indictment.

Under the second count of the indictment all of the defendants are charged with a violation of this same section of the Penal Law, in that Paris, from on or about December 10th to on or about December 11, 1946, promised Francis Filchock a similar amount and wager, with intent to influence him to lose the game, and in this count the defendants are charged with being concerned in the commission of said promise or offer by aiding, assisting, abetting or directly or indirectly counseling, commanding, inducing and procuring Paris to commit this bribery or promise or offer.

Under the third count of the indictment all defendants are charged with the crime of conspiracy, committed as follows:

The defendants, in the County of New York, from on or about December 9, 1946, to on or about December 14, 1946, conspired to commit the crime of bribery of participants in a professional football game, in violation of Section 382 of the Penal Law, and to commit acts injurious to the public morals, in that the defendants, while acting in concert with Alvin Paris, unlawfully conspired to promise and offer professional football players Hapes and Filchock, members [fol. 863] of the Giants team, the sum of $2,500 in currency and a $1,000 wager, with intent to influence them to lose the game or cause the game to be lost which was to be played on December 15th.

In furtherance of this conspiracy it is charged, and to effectuate the objects thereof, on or about December 10, 1946, conspirator Alvin Paris met and conferred with professional football player Merle Hapes in premises 56 West 56th Street, and second, and in furtherance of the conspiracy it is alleged that on or about December 10, 1946, conspirator Alvin Paris met and conferred with said professional football player Francis Filchock.

Now, we are not concerned in this cause with any gambling or bookmaking, or any gambling that these defendants may have done, either for themselves or for anyone else. We are concerned under the first two counts of this indictment with an alleged violation of Section 382 of the Penal Law, which is entitled, "Bribery of Participants of Profes-

sional or Amateur Games, Sports or Contests," and this statute reads as follows:

"Whoever gives, promises or offers to any professional or amateur baseball, football, hockey, polo or basketball player who participates or expects to participate in any professional or amateur game or sport, any valuable thing with intent to influence him to lose or try to lose or cause to be lost or limit his or his team's margin of victory in a baseball, football, hockey, polo or basketball game in which [fol. 864] such player or participant is taking part or expects to take part or has any duty or connection therewith, is guilty of a felony."

Now, you will note these elements of this Section of the Penal Law:

First, the offender must either give or promise or offer something of value. This particular statute makes no distinction between the actual giving and a promise or an offer. That element of the crime is satisfied whether the offender actually gives or merely makes a promise or an offer.

The word "promise" has been defined, as to make a declaration assuring something—to engage to do—an assurance given by one person to another that the former will or will not do a specific act—a declaration made which binds the person who makes it either in honor, conscience or law; and the word "offer" has been defined as to tender, present or bring before one for acceptance or rejection—to evince a readiness to do something—the voluntary act of tender or proposing to pay a certain sum as for something desired or to accomplish a specific undertaking for a certain sum.

The next element is that the promise or offer must be to a professional football player who participates or expects to participate in a professional game, and the offer or promise must be with a criminal intent, with intent to influence him to lose or try to lose or cause the game to be lost, or to limit his team's margin of victory.

As I said, this statute entitled, "Bribery of Participants [fol. 865] of Professional or Amateur Games," makes no distinction between the person who gives any professional player anything of value or promises or offers something. Hence, whether anything of value passed is of no consequence, provided you are satisfied beyond a reasonable doubt that a promise or offer of something of value with intent to influence the player was made.

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So, if in the course of this charge I use the word "bribery" or the words "attempted bribery" or "promise" or "offer," so far as this statute is concerned it makes no difference. I am always referring to an alleged promise or offer if I use the words interchangeably.

As I pointed out, you will note that under the first count of the indictment it is alleged that Alvin Paris, from on or about December 9, 1946, to December 11, 1946, promised and offered Merle Hapes the sum of $2,500 in United States currency and a $1,000 wager with intent to influence him to lose or try to lose the game.

And second, that the defendant Harvey Stemmer was concerned in the commission of the said bribery and felony by Alvin Paris, in that he aided and assisted and abetted Paris in its commission.

Similarly, under the second count it is alleged, first, that Paris from on or about December 10, 1946 to December 11, 1946, promised and offered Francis Filchock the sum of $2,500 and a $1,000 wager with intent to cause him to lose the game, and in that count the defendants Stemmer, Krakower and Zarowitz were concerned in the commission of said bribery and felony, in that they aided, assisted and abetted Alvin Paris in its commission.

[fol. 866] In other words, it is the contention of the People and the District Attorney that under the first count of the indictment Alvin Paris is the one who made the promise and offer to Hapes, with intent to cause him to lose the game, and that Stemmer was concerned in the commission of this alleged bribery in that he aided and abetted and assisted Paris.

And under the second count of the indictment it is the contention of the People that Paris was the one who made the offer or promise to Francis Filchock, and that each of these defendants were concerned in the commission of this offer or promise by aiding and abetting and counselling and advising or procuring or inducing Paris to commit the crime. In other words, the People charge these defendants with being accomplices of the witness Paris.

In that connection, our law says that a person concerned in the commission of a crime, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

This means that when two or more persons are acting together to accomplish a common unlawful purpose, that is, a crime, each doing acts tending to accomplish their common criminal purpose, they are all equally guilty of the crime that was committed which was the subject matter of their joint action.

When persons act together to accomplish a common criminal purpose, they are each responsible for the acts of the [fol. 867] other concerned in that combination, and when they so act together the law says that they are accomplices of each other, that they are principals in the crime.

The law, ladies and gentlemen, cannot with the meticulousness of a mathematician separate or apportion guilt or fix percentages, so whether a person commits a subordinate or a major part or is present or absent makes no difference, if he is concerned in the commission of the crime, either by advising or procuring or aiding in the commission of the crime.

And I charge you that if you should find beyond a reasonable doubt that Paris offered or promised or attempted to bribe Hapes, as charged in the first count of the indictment, that it is a question of fact for you to determine whether the defendant Stemmer aided, assisted or advised or abetted Paris in its commission.

And similarly, if you should find beyond a reasonable doubt that Paris offered to bribe Filchock, as charged in the second count of the indictment, that it is a question of fact for you to determine whether any of these defendants aided or assisted or abetted or advised or induced Paris in its commission.

If you are satisfied beyond a reasonable doubt that any of these defendants aided, assisted or abetted Paris, or were concerned in the commission of either of these two promises or bribes, then the law says in such case that those who are concerned were accomplices of one another, and if you find as a fact that they were accomplices of one another, then the acts of each of the accomplices are binding on the others, and the acts of all are binding on each of them.

[fol. 868] So that if you are satisfied beyond a reasonable doubt under the first count of the indictment, that is, the Hapes count, first, that Alvin Paris promised or offered something of value to Hapes, and that Hapes expected to participate in the football game on December 15th, and that

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the promise or offer was with intent to influence him to try to lose the game, and that the defendant Stemmer was concerned in the commission of this bribery, in that he either aided, assisted or abetted, or directly or indirectly counselled, commanded, induced or procured Paris to do it, then the People will be justified in asking for a conviction as to the defendant Stemmer under the first count of the indictment.

On the other hand, if you are not satisfied beyond a reasonable doubt that Paris either promised or offered something of value to Hapes, with intent to influence him to lose the game, or if you are not satisfied beyond a reasonable doubt as to the defendant Stemmer's participation therein, that is, that Stemmer was concerned in the commission of the bribery of Hapes, then in such case you must acquit the defendant Stemmer on the first count.

And similarly, with respect to the second count, if you are satisfied beyond a reasonable doubt that Alvin Paris promised or offered something of value to Filchock, and that Filchock expected to participate in the game, and that the promise or offer was made with intent to influence Filchock to lose or try to lose the game, and that any of these three defendants were concerned in the commission [fol. 869] of this bribery, in that they aided or assisted or abetted Alvin Paris in its commission, or directly or indirectly counselled, commanded, induced or procured Paris to commit the bribery, then in such case the People would be justified in asking for a conviction under the second count of the indictment against such defendant whom you are satisfied aided, assisted or abetted Paris in its commission, or directly or indirectly counselled, commanded or induced or procured Paris to do it.

But what I said with respect to the Hapes count also applies here. If you are not satisfied beyond a reasonable doubt that Paris either promised or offered something of value to Filchock, with intent to influence him to lose the game, or if you are not satisfied beyond a reasonable doubt as to any of the defendants' participation therein, then such defendant who was not concerned in the commission of the crime must be acquitted under the second count, which is the Filchock count.

Now, with respect to the third count, the conspiracy count, wherein these defendants are alleged to have con-

spired between December 9th and 14th to commit the crime of bribery of participants in a professional game, and to commit acts injurious to public morals, in that they conspired with Alvin Paris to promise and offer Hapes and Filchock the sum of $2,500 each and a wager to lose the game, wherein certain overt acts are alleged. While this conspiracy charge refers in the main to the attempted bribery of the two players alleged in the first and second counts, it is the law that where persons conspire to commit [fol. 870] a particular crime, they may be guilty of the conspiracy, which is a misdemeanor, as well as the completed crime, which in this case is a felony.

So, as I said, you will consider each of the three counts separately as against each defendant.

Our statute says that when two or more persons conspire to commit a crime, each of them is guilty of a misdemeanor.

And in this case they are charged with conspiracy to commit a violation of Section 382, which I defined for you and is known as bribery of participants in a professional game.

A conspiracy is a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, followed by one or more overt acts to effect its purpose.

While the law condemns agreements to accomplish unlawful objects, it is immaterial whether the objects of the conspiracy had or had not been accomplished.

You will note that the indictment alleges two overt acts: That in furtherance of the conspiracy, Paris met and conferred with Merle Hapes on December 10, 1946, at 56 West 56th Street, and that on December 10, 1946, in the County of New York, Alvin Paris met and conferred with Joseph Filchock.

While the indictment alleges two overt acts, it is only necessary that one of them be proved by the State.

Now, what is an overt act? An overt act is an open act committed by any person connected with the conspiracy. The overt act need not of itself be unlawful. It is not [fol. 871] necessary that all the parties to a corrupt agreement should have participated in the doing of an overt act alleged to have been committed.

It is not necessary for the People to prove that some of the parties to a corrupt agreement did all of the acts.

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It is not necessary that all the parties to a corrupt agreement had knowledge of all of the overt acts alleged to have been committed in furtherance of the objects of the conspiracy.

It is necessary for you to find that some overt act charged in the indictment was done by one or more of the parties to the corrupt agreement in furtherance of the objects of the corrupt agreement.

If you so find, then that portion of the statute is satisfied, because in contemplation of law that overt act becomes the overt act of all the parties who you find may have been parties to the conspiracy at the time of the commission of the overt act.

If you find that any of these defendants combined with Alvin Paris to do either of the acts alleged in this conspiracy count, then each of the defendants who combined with Alvin Paris is criminally responsible for any act of his associates done to effect the objects of the conspiracy.

If you find that there was an unlawful combination or an unlawful conspiracy or a corrupt agreement, then any defendant who you find was connected with such unlawful conspiracy is bound by the acts and declarations made by [fol. 872] one of the parties to the conspiracy, whether known to his fellow conspirators or unknown to him.

But I charge you that it is only in the event that you find that a defendant was a party to the conspiracy, that the acts of the others, done to effectuate their common unlawful object, are binding on him.

Now, if I refer to any of the testimony in this case you are not to accept my recollection of the testimony, nor should you accept the District Attorney's recollection, nor the attorneys for the defendants' recollection, because it is your recollection exclusively which controls. You are not to limit yourselves to the testimony to which I refer, nor are you to get the impression that because I refer to some parts of the testimony that you are to lay particular stress upon the testimony to which I refer. I am using some parts of the transcript of the testimony and some notes to refer to some principles of law, and to give you a brief summary of the testimony. You are to consider all the testimony in the case.

Frank Filchock testified that in 1946 he was a professional football player and a member of the New York Giants Foot-

ball Team, for whom he played the position of halfback, and that he was their principal passer.

He testified that on November 30, 1946, at the invitation of Merle Hapes, he attended a cocktail party given by the witness Alvin Paris at his apartment and business office located at 56 West 56th Street.

He said that the next time he saw Alvin Paris was on December 4th, when, together with Merle Hapes and two young ladies, they visited a restaurant called the Studio [fol. 873] Club in Westchester. There they drank and dined at the expense of Paris.

He said he next saw Paris the following Friday, December 6th, at 56 West 56th Street, when he offered him a job working for his novelty concern.

The next time he saw him was the following Tuesday, December 10th, at the invitation of Paris, when he had a conversation with him about working for the novelty concern, when he offered him a job starting at $50. per week and on a commission basis, and when he promised to get him an automobile.

On that occasion he testified Alvin Paris asked him if he ever thought a football game could be thrown, and he, the witness, said, he did not know, he did not think so. "I said I don't see how anybody could throw a football game, and I said I would not do it anyhow if I had the opportunity to, and he said, 'Well, you know that the play-off share is only going to be $1,700.,' and I said, 'Well, that's sufficient for me.' I said, 'If we can win that's going to be plenty.' I said, 'I know the other boys think the same thing,' and he says, 'Well, I would like to make a little money on it.' I said, 'Well, the only way I can see is, I understand the Giants are getting ten points, and to bet on the Giants.' He said, 'Well, I can't do that, I will have to bet on the Bears and give ten points.' I said 'I am terribly sorry, I am not going to do anything, I have never done anything like that, I never will, and I don't want to have a damn thing to do with it,' so he said, 'Kind of think [fol. 874] it over,' and I said, 'No soap, I don't want a damn thing to do with it.' 'Well, then,' he said, 'There would be $2,500. in it for me, plus a $1,000. bonus, if I could see that the Bears won by ten points,' and that's when I said, 'No soap.' There wasn't anything to it. 'I won't do anything like it.' "

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Filchock said that the following day, Wednesday, Alvin Paris called him at his hotel and wanted him to come down to see him, and he said he could not make it. Then he asked him to meet him at the Liberty Lunch at Broadway and 100th Street.

He testified that at 2 o'clock that afternoon, December 11th, he met Paris, "and there he asked me what I thought, and I said, 'Alvin, as I said before, I don't want to have a damn thing to do with it. I am married and have children, and the other boys have a lot of confidence in me and I am not going to do a damn thing about it.' "

Merle Hapes testified that in the fall of 1946 he was a professional football player attached to the New York Giants, for whom he played fullback. He said he met Paris at his apartment on November 30th, at a cocktail party to which he was invited by Sidney Paris a few days previous.

When he arrived there he said he asked Paris whether he could invite a friend, and he was told that he could and he invited Filchock.

The next time he saw Alvin Paris was Sunday night, December 1st, at his apartment, pursuant to invitation. Present there were Vic Carrol, his wife, Howie Livingston and his wife, and Hapes' wife. At that time there was [fol. 875] some conversation about a position with Alvin Paris's firm, and they were offered jobs as representatives to sell metal objects.

He said that he saw him again on Wednesday at the apartment, then left there with a young lady, picked up Filchock's date, then came back to the apartment, picked up Al, and then they picked up Frank Filchock, following which they rode out to the Studio Club in Westchester, where they had dinner and drinks.

He said that one or two days later he again saw Alvin Paris at his apartment, where they had a conversation about the job.

On Sunday evening, December 8th, he said he saw Paris at his apartment, where there were present the witness's wife, his brother Raymond, Alvin Paris and Sidney Paris. He said they went out to dinner, following which they took his, Hapes' brother, to the Pennsylvania Railroad Station, after which Sidney Paris left.

Then he testified they went to the Carnival night club, following which they went by the apartment and dropped

his, Hapes' wife, off, and he and Alvin Paris went to the Martinique, where they had some drinks, after which they went to the Copacabana night club.

There, he said, Alvin Paris told him it would mean more money for him if the Bears would win the ball game. "I said, 'What do you mean?' He said he wanted us to be sure that the Bears would win by ten points. In other words, he wanted us to throw the ball game, and he asked me if I could do it. I said, 'No, not myself,' and he said 'Frank Filchock is the man,' and he asked me if I would speak to Frank Filchock. I says, 'No.' "

[fol. 876] "Q. Well, did he say what it would mean to you if you would throw it? A. It would mean $2,500 and a $1,000 bet.

"Q. If you would participate in throwing the game? A. With him, in throwing the ball game.

"Q. That would be your share? A. And Frank Filchock's too.

"Q. Each one would get—— A. $2,500 total."

He testified that on Tuesday, December 10th, he told Filchock that Al wanted to see him.

On that day he said he went to Paris's apartment, and Paris told him the proposition still goes. I said, "It is no good." He asked me if I spoke to Filchock, and I says, "No, I told him that you wanted to see him."

He testified that he left the next morning for Bear Mountain, and that Paris called him on Thursday. "He asked me how Frank was, and I said, 'It's still no good.' He asked me, 'How does Frank feel about the offer?' I said, 'It's still no good, Al.' "

At that point Hapes testified he asked Paris if he would drive his wife and baby and Jim Pool and his wife and baby to Bear Mountain on Friday, and he said he would.

He testified that Paris came to Bear Mountain on Friday, December 13th, when they had lunch together, and afterwards he said Paris asked him how everybody felt, and he said that he still likes the Bears, to which he replied, " 'You got a loser,' and he said, 'Well, it's only a matter of $1,000 to me.' "

Alvin Paris testified that he knew the defendant Stemmer for about a year and a half, that he knew the defendant [fol. 877] Krakower for about two and a half years, and

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that he knew the defendant Zarowitz for two and a half years.

He said that during the months of November and December he visited Stemmer at Bellevue Hospital three or four times, and saw him in his, Paris's apartment, three or four times; that during the month of November he and the defendant Stemmer had shared certain bets on sporting events.

He said that he had an interest in an art metal novelty company known as the Jay Manufacturing Company, located at 56 West 56th Street.

He testified that on November 30th, at a cocktail party given by him, he met the witness Hapes, who had been invited by the witness's father, Sidney Paris. On that occasion he said Hapes asked him if he could invite a friend, and he said he could, and he invited Filchock.

He testified that on November 30th he asked both Filchock and Hapes how they thought their team, the New York Giants, would do the following day, and they told him that they did not think their team was a seven point favorite to beat the Rams.

He said that later that evening he spoke with the defendant Stemmer, who asked him if he had spoken with the football players about how they would do the following day, and that he told Stemmer what they thought, whereupon Stemmer told him to call Jerry and give the information to Jerry.

Then he said he called the defendant Zarowitz at an Elizabeth telephone number in New Jersey, and told him [fol. 878] that he had spoken with Harvey, and that Harvey had told him to tell Jerry what the football players had said.

He testified further that he had a bet on the Rams the following day which he shared with the defendant Stemmer.

He said he went to the football game at the Polo Grounds the next day, where he saw the defendant Krakower, and spoke to him and told him that the football players didn't think that the Giants would win by seven points.

After the game he said he went back to his apartment, and that pursuant to invitation Merle Hapes and his wife, Vic Carroll and his wife, Howie Livingston and his wife, came to his apartment, where food was served, and where they had drinks.

At that time he said he spoke to the three football players about a job with the metal novelty company.

The following afternoon he said Hapes appeared at his apartment, after which he testified he again spoke with the defendant Stemmer and told him that the fooball players had been to his house, and that he had offered them jobs.

On Tuesday he testified Filchock and Hapes appeared at his apartment, where there was some discussion about the job with the novelty company. On that occasion he said he asked them how they thought they would do against the Redskins. They told him that they were quite confident of winning the game.

He said that the following day, Wednesday, Hapes, Filchock, two young ladies and he went to the Studio Club in Westchester for dinner.

He testified that on Wednesday, before he went out with [fol. 879] the football players, he had a conversation with the defendant Stemmer, who asked him if he thought he could do anything with Filchock and Hapes to get them to throw the game against the Redskins, and that he, Paris, said that he did not think that he could because they were very certain of winning the game, and that they were desperately going out to win the game, to which Stemmer is alleged to have said, "Well, you tell them to go out and win and tell them that you are making a $500 bet for each of them to win the game."

He said that prior to going to the Studio Club he asked Hapes how the boys were working and he said, "They are sure of winning," after which the witness said he told him that he was going to bet $500 for him to win on the Giants.

On Thursday, December 5th, the witness testified he spoke to Stemmer again and told him about his conveying the message to the boys that he would bet $500 for each of them, at which time Stemmer told him to call Pete Krakauer and to tell him of the bet to be made for the boys.

He said he called the defendant Krakower at his residence and told him that Harvey had told him to tell the boys to go out and win the game and to bet $500 for each of them. To that he said the defendant Krakower told him to call Jerry Zarowitz at the office and to make the bet for the boys. Following which, he testified, he called Zarowitz at an Elizabeth number and told him about having a conversation with Stemmer and Krakower that the boys said they were going

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to win the game, and about Stemmer telling him to make the bet.

[fol. 880] He testified further that on Friday, December 6th, he saw the football players again at his apartment at his invitation, where they spoke about the job.

He said that on Friday or Saturday or Sunday before the Redskin game the defendant Stemmer called him and asked him if he thought he could get the fellows to throw the game between the Chicago Bears and the Giants by ten points or more, and to offer them $2,500, plus a $1,000 bet on the game, to which he, the witness, said he would speak to them about it.

Paris said that he made a total bet on this game of December 8th of $1,550, in which Stemmer shared.

Before he left for the game on Sunday, December 8th, he said he spoke with Stemmer, and Stemmer told him that if he saw Krakower at the game, to tell Krakower that they had $1,550 bet on the game, and that if he wanted to share the bets with them and take one-third, he could.

He said Krakower agreed to take one-third of the bet at the game. After the game on December 8th he said he went back to his apartment, where he met his father, Merle Hapes, his wife and Hapes' brother, who came there at his invitation.

On the evening of December 8th he said he went out with Merle Hapes to various places, and finally to the Copacabana night club, where he asked Hapes if he thought the game between the Chicago Bears and the New York Giants could be thrown, and asked him if he could throw the game. He told him if he could help to throw the game it would be worth $2,500 and a $1,000 bet for him.

[fol. 881] At that time he testified Hapes said he was not sure whether he could do it, whereupon he asked him if he thought that Frank Filchock would do it, and he said that Frank would be a strong enough factor to do it. He testified that Hapes said he was willing to go along with the idea and would speak with Filchock on Tuesday when he returned from Washington.

He testified further, at some time on Monday, December 9th, either in the morning or the afternoon, he spoke with the defendant Stemmer, after which he said that either on Monday or Tuesday morning he spoke with the defendant Krakower at Dunhall's Restaurant, where he told the de-

fendant Krakower about Stemmer telling him to make the offer to the two football players, and that he had made the offer of $2,500 plus a $1,000 bet to Hapes to throw the game, and that either he or Hapes were going to speak with Filchock the following day, to which Krakower is alleged to have said, "O. K. to tell that to Jerry," and "that I should keep him informed when I heard from Filchock."

On that occasion he testified that he also told him, Krakower, that he had a lot of expenses in taking the players out, to which the defendant Krakower is alleged to have said that he would get that money, not to worry, that "I will get that money."

After he spoke with Krakower he testified he got in touch with the defendant Zarowitz and said, "And I told him that Stemmer had told me to offer $2,500 and a $1,000 bribe to each of the players to throw the game. I told him that I had offered it to Hapes and Hapes had accepted it, and that either I or Hapes was going to offer it to Filchock on Tuesday."

[fol. 882] "Q. What did Zarowitz say, if anything? A. Zarowitz told me to keep him informed on what happened after I spoke with Filchock."

He testified further that he saw Filchock at his, Paris's apartment, on the afternoon of Tuesday, December 10. On that occasion he said he offered the bribe to Filchock, who said he had never done anything like that and he did not know whether he could do it, and he did not know whether he would do it, and he, the witness, told him to think it over and to let him know the following day before they left for Bear Mountain.

After Filchock left he testified he spoke with the defendant Stemmer and told him that he had offered this bribe to Filchock, that Filchock had not turned it down but said he would think it over and let him know the following day before he left for Bear Mountain.

On that occasion Paris testified Stemmer told him to convey the message to Krakower, whereupon he testified he called the Jerome number and spoke with the defendant Krakower about making the offer to Filchock, and that Filchock was going to think about it, and he, Krakower is alleged to have said, "He told me to let him know when I heard from Filchock the following day."

The witness testified that on Wednesday, December 11th,

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Filchock called him on the 'phone and told him he was not going through with the offer and would not have a chance to see him, whereupon he asked Filchock if it would not be possible to meet him at a restaurant at 101st Street and Broadway, and Filchock said that he would.

[fol. 883] He testified that they met at this restaurant, when Filchock again told him that he would not go through with it, he would not know how to do it, and would not do it to the rest of the fellows.

Whereupon, he said he returned to the apartment, where he received a telephone call from the defendant Stemmer, on which occasion he told Stemmer that Filchock said he would not go through with it, but that Hapes was going to speak with him from Bear Mountain, at which time Stemmer told him to call Pete and tell Pete "that because they had already bet $20,000 on the game—that Pete had told Jerry to bet it, and Jerry bet $20,000 on the game."

He said that after his talk with Stemmer on Wednesday, he called the defendant Krakower and told him that he just spoke with Stemmer, that Filchock didn't want to go through with this bribe, "and I asked him if they had bet money, and he said he had told Jerry to make the bets because he thought from what I had told him he thought Filchock would go through with it."

"I said that they shouldn't have made the bets so soon, that they should have waited until it was set, and he told me to call Jerry and to tell Jerry to start laying off on the bets."

Following that, he testified he called Jerry, who appeared at his apartment a little later, "at which time I asked him if he had made any bets, and he said yes, he had bet about fifteen to twenty thousand on the Chicago Bears, and I asked him why he had made the bets, and he said he had spoken with Pete and Pete said to make the bets because he thought this thing would go through."

[fol. 884] "At that time I told him that Filchock had backed out, that he had better start hedging on the bets. At that time I also told him about the expenses I had taking the football players out, and he said not to worry, that I would get my money back."

He testified further, between the time that he called Jerry and the time that Jerry appeared at his apartment, the defendant Stemmer called and told him that he would have to do something to get the football players to go along with this

idea, and told him to offer Filchock $5,000 and Hapes $2,500.

The following day, Thursday, December 12th, he said he again spoke to the defendant Stemmer, wherein he told him that he was going up to see the football players the following day.

He testified further that he visited Stemmer, who again suggested making the offer of $5,000 to one of the players, and $2,500 to the other, and that he, Paris, said he did not think it was a very good idea, and told him he was going to see the players the following day at Bear Mountain, and that he, Stemmer, should call him when he got back from there and he would let him know what happened.

He said that the following day he drove up to Bear Mountain where he spoke to Hapes, and then he returned to his office, where he made some 'phone calls.

He said he called the defendant Krakower and told him that Filchock still does not want to go along with the idea, that Hapes did, but that Hapes was going to speak with Filchock again, and call him later, that he would let him know after he spoke with Hapes.

[fol. 885] At that time he said the defendant Krakower told him to call Jerry and let Jerry know. He said that he called Jerry and told Jerry that Hapes wanted to go through with the idea, but that Filchock had backed out, and that he was going to hear from Hapes again that day.

He said that he again spoke to the defendant Stemmer, who said that he was willing to go along with one of the players, that he, Stemmer, thought that would be good enough, to which the witness said, "I told him I did not think much of the idea, and there was too much of a chance of friction between the two of them, as a bribe offer had been made to both of them, and one would be trying to win and one trying to lose."

He testified further that he again spoke to Krakower and told him that "Stemmer was willing to go along with one of them," but he, Paris, did not think it was a good idea, and that Krakower said, well, whatever was decided would be all right with him, whether he went along with one "or if we drop the idea".

Paris said that he also spoke to Zarowitz and told him that he had spoken with Stemmer and Pete, "and Stemmer was willing to go along with one, and Pete, he did not care, he would go with one or drop it. I thought it would be best

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to drop it, and he agreed with me. He thought it would be best to drop it. As long as they could not both go along there might be a chance of friction."

After that he testified that he heard from Hapes, and said he asked Hapes if he had spoken with Filchock, and he said Filchock did not want to go along with it, and Paris said, [fol. 886] "The best thing to do would be to forget it, drop the whole idea," and he said, "Well, he would like to go through with it because he could use the money."

"Well, I said I did not think it was very good, that there was a chance of friction."

The next day he said he spoke with Hapes on the telephone, wherein he told Hapes that the entire thing was off, that they should forget it.

On cross examination Alvin Paris testified that when he made a statement on December 15, 1946, to Mr. Monaghan in which he said it was on his own that he was making the offer to the football players, he did not tell the truth.

He testified that he lied to Mr. Monaghan when he told him on the morning of December 15, 1946, that he had no conversations about football with the players after the cocktail party.

He said that when he made the untruthful statements that he did it to protect the defendants, and he did not know at the time that not reporting a bribe was a crime, and that the football players could be thrown off the team, that he thought by saying they turned down the offer it would clear them of any charges.

He said that he talked with Krakower twice during the week following the Redskin game; that he was not sure whether it was Monday or Tuesday or Wednesday that he spoke with Krakower at Dunhall's.

Sidney Paris testified that he knew the defendant Krakower for about a year; that after his son was arrested he tried to get the defendant Krakower on the 'phone without success. That on the afternoon of December 15th he was called to the 'phone at the bail bond office and spoke to [fol. 887] Krakower, who asked him what was being done, and he told him a bond was being drawn up, but that it could not be executed until they got to the Night Court. He said that the Magistrate in the Night Court refused to accept the bond, following which he called the defendant Krakower on the 'phone, who invited him up to see him at his home.

There he said he told Krakower that the bond was not acceptable, that he had to get the boy out, and asked him to put up the $28,000 bail in cash, to which the defendant Krakower is alleged to have replied, "Don't worry, we will get it up. Tell the kid to keep his mouth closed."

He testified further that he saw the defendant Krakower again at Dunhall's Restaurant the following Monday or Tuesday, told him that he could not get him out and that he had to get his son out, and asked him to please have the cash, and the defendant Krakower told him to call him up at home that night.

Joseph L. Jove testified that he was a patrolman attached to the Manhattan Borough Headquarters, and that he made installations for the interception of telephonic communications twenty or twenty-five times; that pursuant to an Order of the Supreme Court he made such installations at Circle 5-8020, Circle 5-5155 and Circle 5-7366; that from December 5th to December 14, 1946, at various hours of the day he intercepted a number of telephone conversations, in which he identified the voices of Alvin Paris and each of these defendants.

He said that he made notes at the time that he overheard these conversations, and that those notes offered in evidence are in part the very words that were said over the tele- [fol. 888] phone during the conversations, and other parts are the substance of the conversations as he retained them in his mind after the conversations had been concluded.

The witness testified further that subsequent to the interception of these telephonic conversations he heard the voices of each of these defendants, and identified the voices of these defendants as being the ones who participated in the conversations which he had intercepted.

The text of these conversations, or the notes with respect to these conversations, have been offered in evidence and are now an exhibit, they have been testified to by Officer Jove, and are no doubt fresh in your minds. They have been read to you and elaborated upon by the Assistant District Attorney. There is, therefore, no need of my repeating these conversations to you or reading them to you, but I will refer to them again in a moment.

The defendant Zarowitz has taken the stand and testified in his own behalf. He said that he has been called by the names of Jerry, Jerome and Red, and never any other.

He testified that since November, 1945, he worked as a

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handicapper and clerk for Eddie Ginsberg, who operated a bookmaking office.

He said that from October, 1946, to December 15, 1946, the bookmaking office was located at Elizabeth, New Jersey. As handicapper he said he would decide what the odds would be on a particular game or contest to take place. He said he had nothing to do with the finances of the office and [fol. 889] never accepted any bets on his own or for himself.

He testified further that he knew Alvin Paris close to two years, having first met him in the flower shop, but that he never went out with him socially and never had any business relations with him.

He said he never told Alvin that he had any interest in Eddie Ginsberg's business.

In this office in Elizabeth, New Jersey, he testified there was a table about four by five feet long, with two telephones, that it was a very busy office. He said the office never made any wagers, only accepted bets. He said that sometimes he would answer the 'phone and accept bets for the office.

In this office, he testified, there were three persons, one known as Red, another as Jackie, and another as Jerry. The person answering the 'phone, no matter how he was addressed, would usually say, "Yes what is it?" to expedite the taking of bets.

He testified that he never had any business ventures or shared any bets with the defendant Krakower.

He said that he did not know Stemmer and never had any business or social relations with him, and never spoke to him.

He said that Paris never told him on the 'phone that he was fixing a game or that Paris ever told him, Zarowitz, to call Krakower, or that Krakower had told him, Paris, to call him, Zarowitz.

He said the first time he learned about any attempts to bribe Hapes and Filchock was on Wednesday, December [fol. 890] 11th, when he received a telephone call from Alvin Paris to visit him at his apartment. And when he, Paris, told him that it was important, to come over, the defendant said he told him that he would come over as soon as he got through with his business.

He testified that he went to 56 West 56th Street and spoke to Alvin Paris, at which time Paris told him about

some bookmaker he had met, and he also told him how friendly he had gottten with the Giant Football Team, and that he had offered a bribe to Hapes, who had agreed to throw the football game, and that he had offered a bribe to Filchock and Filchock was not sure, to which the defendant, "I told Paris that I was not interested in his rumors or his nonsense."

The defendant further testified that he never in any way suggested, counselled, aided, or advised Paris in connection with either of these offers to bribe the football players, and never authorized anyone to use his name or to make any bets for him.

He denies that he made a call from Paris's office on December 11, 1946. He said he did not speak with Paris on Friday, December 13, 1946; that after December 11, 1946, he testified he never spoke to Paris about Filchock or Hapes. He denies that he ever spoke over the 'phone to Paris or anyone, and said he was willing to go ahead with two football players and not with one.

He testified further that on December 18, 1946, he had a 35-second conversation all told with Officer Jove. He denies [fol. 891] that he ever told Paris that he would share any expenses or take care of the expenses.

Now, as I pointed out to you earlier in my charge, it is the contention of the People that under the first count of the indictment Paris promised and offered Hapes $2,500. in United States currency and a $1,000. wager for him to lose or try to lose the game, and that Stemmer aided and assisted and abetted Paris in this bribery, and that under the second count the People contend that Paris promised and offered Filchock a like sum with intent to influence him to lose or try to lose the game between the Chicago Bears and the Giants, and that each of these three defendants aided, assisted and abetted Paris in this bribery. Under the third count the defendants are each charged with the crime of conspiracy, in that they conspired to commit the crime of bribery of participants in football games in violation of Section 382 of the Penal Law.

I also pointed out to you that under our statute a person concerned in the commission of a crime is a principal. Whether any or all of these defendants were principals, or concerned in the commission of any of these three crimes, if you find that they were committed, are questions of fact for the jury.

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To constitute one a principal, he must have taken part in the preparation or perpetration of the crime with intent to assist in the crime. To justify the conclusion that a person is a principal, enough must be shown to draw an inference that the offender has counselled or induced or encouraged the crime. Failure to disapprove, or the mere [fol. 892] approval of a crime after the event, or even before the event, is not of itself sufficient to constitute one a principal.

Some act or word of counsel, inducement, encouragement, participation or procurement must be added to passive acquiescence.

If you come to the conclusion with respect to any of these defendants that they were not concerned in the commission of either of these alleged bribes or in the conspiracy, then you should acquit such defendant who you find was not concerned in the bribes or in the conspiracy.

As I said, whether any of these defendants were principals or accomplices, or concerned in the commission of these alleged crimes are questions of fact for you to determine. However, I charge you as a matter of law that the witness Alvin Paris, from his testimony in this case, is an accomplice as a matter of law with respect to each of these three crimes charged, and where a person is an accomplice as a matter of law, and gives testimony at the trial, the following rule applies:

A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendants with the commission of the crime.

This provision which I have just read to you, means that before you can convict there must be, in addition to the testimony of Alvin Paris, who, as I said, is an accomplice as a matter of law, independent evidence supporting his testimony with respect to each of the counts of the indictment, and with respect to each of the defendants.

The "other evidence", that is, this independent evidence, [fol. 893] called corroborative evidence, need not show that a defendant was connected with the commission of the crime. It is enough if it tends to connect a defendant with the commission of the crime.

This independent evidence must tend to connect each defendant with the commission of the crime or crimes

charged, and must be inconsistent with the innocence of such defendant. It must be evidence from an independent source of some material fact tending to show that the defendant was implicated in the crime or crimes.

It need not connect each defendant with the commission of the crime or crimes themselves, but is sufficient if, unaided by the testimony of the accomplice, it tends to connect each defendant with the commission of the crime or crimes charged.

The principal test in determining whether there has been sufficient corroboration of the testimony of an accomplice is, first, to eliminate the evidence of the accomplice, and then, if upon the examination of all the "other evidence" there is sufficient inculpatory evidence tending to connect each defendant with the commission of the crime or crimes charged, then you can say to yourselves "there is sufficient corroboration."

As I said, you must find independent testimony, in addition to the testimony of the accomplice Paris, tending to connect each of the defendants with each of the crimes before you can convict such defendant of the crime or crimes charged.

And I charge you that the testimony of an accomplice should be scrutinized with great care and caution.

[fol. 894] It does not necessarily follow that an accomplice will lie upon the witness stand. You have heard the testimony of Paris. You have observed him on the witness stand, and it is for you to say in the light of his testimony and his demeanor, what weight to attach to his testimony. That is a matter for your judgment and common sense.

Now, the People contend that in the testimony given by Officer Jove as to the telephonic conversations which he intercepted, and wherein he identified the voices of the defendants, you will find the necessary corroboration tending to connect each of the defendants with the crimes charged in the indictment.

If you are not satisfied beyond a reasonable doubt from the testimony of Officer Jove that he intercepted these telephonic conversations, or that the voices were those of the defendants, or that the statements which he testified he overheard as having been made by each of the defendants, in substance, were made by each of these defendants, then I charge you as a matter of law that the corroboration

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which the District Attorney contends tends to connect each of the defendants with the crimes charged, is lacking, and that you should acquit such defendant who you are not satisfied made the statements attributed to him over the telephone, as reported by the witness Jove.

On the other hand, if you are satisfied beyond a reasonable doubt that the witness Paris is telling the truth, that is, that he made an offer or promise of something of value to Merle Hapes with intent to influence him to lose the [fol. 895] game between the Chicago Bears and the New York Giants, and you are also satisfied beyond a reasonable doubt that the defendant Stemmer was concerned in the commission of this crime, as charged in the first co. nt of the indictment, and you are also satisfied beyond a reasonable doubt that this independent testimony which the People claim to be corroborative of the testimony of the accomplice Paris, tends to connect the defendant Stemmer with the commission of the crime charged in the first count of the indictment, the People would be justified in asking for a conviction against the defendant Stemmer under the first count of the indictment.

But if you are not satisfied beyond a reasonable doubt that Stemmer was concerned in the commission of the crime, or if you are not satisfied beyond a reasonable doubt that this independent testimony which the People claim to be corroborative of the testimony of the accomplice Paris does tend to connect the defendant Stemmer with the commission of the crime charged in the first count, that is, the Hapes count, then in such case you cannot convict Stemmer under the first count.

And similarly, as to the second count, if you are satisfied beyond a reasonable doubt that the witness Paris is telling the truth, that is, that he made an offer or promise of something of value to Filchock, and you are satisfied beyond a reasonable doubt that any of the defendants were concerned in the commission of this crime, this offer or promise, and you are also satisfied beyond a reasonable doubt that this independent testimony which the People claim to be cor- [fol. 896] roborative of the testimony of Alvin Paris, tends to connect any of the defendants with this offer or promise, as charged in the second count of the indictment, the People would be justified in asking for a conviction against such defendant who you find was concerned in the commission

of the crime, and regarding whom you find such independent testimony.

If you are not satisfied that any of these defendants were concerned in the commission of this crime, that is, the Filchock count, this offer or promise to Filchock, or if you are not satisfied beyond a reasonable doubt that this independent testimony which the People claim to be corroborative of the testimony of the accomplice Paris does tend to connect any of the defendants with the offer or promise to Filchock, then you cannot convict such defendant against whom the People have failed to produce such independent testimony.

And similarly, as to the third count, the conspiracy count, if you are satisfied beyond a reasonable doubt that these defendants, or any of them, between December 9, 1946, and December 14, 1946, conspired with Alvin Paris to bribe Hapes and Filchock to lose the game, and in furtherance of such conspiracy, Alvin Paris committed either of the overt acts charged in this third count; and you are also satisfied beyond a reasonable doubt that this independent testimony which the People claim to be corroborative of the testimony of the accomplice Paris, tends to connect any of the defendants with the commission of this crime of conspiracy, as charged in the third count, the People would be justified in asking for a conviction against such defend- [fol. 897] ant who, you find, was so concerned and a participant in the conspiracy.

As I said, before you can convict any of these defendants under the conspiracy count, you must be satisfied beyond a reasonable doubt that each defendant conspired with Paris and had knowledge of the unlawful purposes of the conspiracy, and acquiesced in the conspiracy.

Now, you recall again the testimony of Officer Jove as to his method of attaching this apparatus and his interception of the telephonic communications.

This testimony may be what is called expert testimony. The general rule is that witnesses must testify to facts within their own knowledge, and not to express their opinions or inferences thereon.

To this rule there are some exceptions, among which is the testimony of experts. The law of this State permits those who are skilled in a particular science not only to testify to facts, but to give their opinions. This is allowed

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because experts are supposed from their experience and study to have a peculiar knowledge of the subject of inquiry.

In determining the value of the testimony of experts you are to consider their learning, their training and their experience, and it is of great importance that the facts from which the expert draws his conclusions shall be satisfactorily established.

In the final analysis, however, the testimony given by an expert is to be weighed by the jury the same as any other testimony, and it is for the jury to say how much weight [fol. 898] and credence they will give to the testimony of any witness who takes the witness stand.

Take this case and decide whether, under the first count of the indictment, Paris promised or offered $2,500. and a $1,000. bet on the game, or anything of value—the amount is of no consequence—to Merle Hapes, and whether Hapes expected to participate in the football game of December 15, 1946, and whether the offer of promise was made by Paris with intent to cause Hapes to lose or try to lose the game, and whether the defendant Stemmer was concerned in the commission of said bribery by Paris by aiding, assisting or abetting Paris in its commission, or by directly or indirectly counselling, commanding, inducing or procuring Paris to commit the said bribery.

Then, under the second count of the indictment, you will decide whether Paris promised or offered $2,500. and a $1,000. bet, or anything of value to Francis Filchock, and whether Filchock expected to participate in this football game, and whether the offer or promise was made with intent to influence him to lose or try to lose the game, and whether any of these defendants were concerned in the commission of the said bribery by Paris by aiding, assisting or abetting Paris in its commission, or by directly or indirectly counselling, commanding, inducing or procuring Paris to commit said bribery.

Then decide under the third count whether any of these defendants conspired with Paris to bribe Merle Hapes and Francis Filchock to lose the game, and to commit acts injurious to public morals.

[fol. 899] Now, your verdict will be separate as to each count and separate as to each defendant.

Under the first count you will decide whether the defendant Stemmer is guilty or not guilty under that count; under

the second count you will decide whether the defendant Stemmer is guilty or not guilty, whether the defendant Krakower is guilty or not guilty; whether the defendant Zarowitz is guilty or not guilty; and under the third count, the conspiracy count, you will decide whether the defendant Stemmer is guilty or not guilty, whether the defendant Krakower is guilty or not guilty, whether the defendant Zarowitz is guilty or not guilty.

Is that clear, Mr. Foreman?

The Foreman: Yes, sir.

The Court: I have one request from you, Mr. Lowenberg.

Mr. Lowenberg: What is that, Judge?

The Court: That the defendant need not take the stand. The jury is charged that a defendant in all cases may testify as a witness in his own behalf but his neglect or refusal to testify does not create any presumption against him. That is the law. That is in the statute.

Follow me, Mr. Barshay, on these requests of yours. If I have already charged them, you call my attention to it.

Mr. Barshay: No. 8, your Honor; No. 20.

The Court: I will charge that after considering all of the evidence, if you find it is susceptible of two constructions, one indicating the defendant's guilt and the other his innocence, you must give the defendant the benefit of the construction most favorable to him.

[fol. 900] Mr. Barshay: No. 20, your Honor.

The Court: Mere knowledge that a crime is going to be committed, and even prior or subsequent approval thereof, are insufficient to make one a principal in the commission of the crime.

I will charge that. I think I have already charged it.

Mr. Barshay: Thank you, sir. No. 22.

The Court: In determining whether Zarowitz was a party to the conspiracy alleged in the indictment, the jury may consider from the testimony in this case what he said and what he did. Is that what you mean?

Mr. Barshay: Yes, I do mean that, the testimony in this case.

The Court: What he said and what he did.

Mr. Barshay: That is right. I left out the word, and I beg your pardon. No. 23.

The Court: I decline to charge No. 23.

Mr. Barshay: I respectfully except.

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The Court: I will charge that the defendant must have been aware of the overt acts committed by any of the other conspirators, had knowledge thereof and been a party to the conspiracy and acquiesced in it.

Mr. Barshay: No. 24, your Honor.

The Court: The integrity of the District Attorney's office is not an issue in this case. It is never an issue in any case. I will charge that.

Mr. Barshay: No. 25.

The Court: I will charge that. A jury has no duty to perform with respect to preserving the cleanliness of sports. Its only duty in this case is to determine the guilt or innocence of these defendants.

[fol. 901] Mr. Barshay: No. 26, your Honor.

The Court: I have already charged that.

Mr. Barshay: No. 27.

The Court: I am not going to charge on items of testimony. I do not think it is an issue in this case. There is no testimony that Zarowitz was a partner, if that is what you mean.

Mr. Barshay: That is what I want to tell the jury, because the District Attorney said to the contrary.

The Court: All right.

Mr. Segal: Would you let me put one request?

The Court: Yes.

Mr. Barshay: Has that been told to the jury?

The Court: I don't find any testimony in this case that Zarowitz was a partner of Ginsberg.

Mr. Monaghan: I believe there is, your Honor; I could point it out, I believe.

The Court: Are you talking about Paris's statement?

Mr. Monaghan: Not the statement. It is on cross examination in the case.

The Court: No.

Mr. Slonim: I refer your Honor to page 411.

Mr. Monaghan: The second question on the page.

Mr. Barshay: That is a conclusion of——

The Court: Just a moment. The charge still stands. Mr. Lowenberg, your requests.

Mr. Lowenberg: I will ask your Honor to charge No. 2.

The Court: What he said to Paris?

Mr. Lowenberg: The father of Alvin Paris.

[fol. 902] The Court: Motion denied.

Mr. Lowenberg: Exception. I will ask your Honor to charge No. 3.

The Court: I will charge that the testimony of Sidney Paris is not corroborative within the meaning of the law. I have told the jury that it must be independent testimony.

Mr. Lowenberg: I will ask your Honor to charge No. 4.

The Court: I will charge No. 4. The testimony of Ida McGuire is not corroboration.

I have already charged the jury, Mr. Lowenberg, that if they are not satisfied beyond a reasonable doubt from the testimony of Officer Jove—the People depend on the testimony of Officer Jove for the independent testimony—they must acquit.

Mr. Lowenberg: Thank you, Judge. I will ask your Honor to charge No. 6. Your Honor charged in it part, but I have particular reference to the great number of favors and special privileges extended to Alvin Paris, as admitted by him.

The Court: I will charge again for your benefit that the jury must take into consideration any reward or hope of reward which he expects to receive, or any motive he has in testifying.

Mr. Lowenberg: In addition thereto, Judge, I would like your Honor to charge that the jury also must take into consideration——

The Court: They may take into consideration any favors or privileges granted to him.

Mr. Lowenberg: That is correct. I will ask your Honor to charge No. 7.

The Court: I will charge No. 7 in this way: That if a juror [fol. 903] should disbelieve the testimony of Alvin Paris, wherein he testified to acts concerning the defendant Stemmer—is that what you mean?

Mr. Lowenberg: That is what I mean—they must acquit and they don't have to consider the rest of the case.

The Court: I have already charged that. I think I covered that pretty fully in my charge. I would have to go through a minute or two of it. If you want me to recharge it I will.

Mr. Lowenberg: If your Honor thinks your Honor has covered it, I am satisfied with the statement of your Honor.

The Court: I will do it again if you want me to, but it cannot be done in the language which you have here.

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Mr. Lowenberg: I will ask your Honor to charge No. 8.

The Court: Well, Nos. 7 and 8 are the same thing. I will say to the jury that if the jury are not satisfied beyond a reasonable doubt from the testimony of Alvin Paris that the defendant Stemmer was concerned in the commission of any of these crimes, then they cannot convict the defendant Stemmer of such crimes which they find he was not concerned in.

Mr. Lowenberg: I ask your Honor to charge No. 9.

The Court: I will charge that Sidney Paris is an interested witness.

Mr. Lowenberg: And that his testimony must be regarded with the greatest care and caution.

The Court: I will charge that Sidney Paris is an interested witness.

[fol. 904] Mr. Lowenberg: I will except. I will ask your Honor to charge No. 11.

The Court: I just charged the jury on expert testimony. They are to take into consideration, in determining what weight and consideration to give to Jove's testimony his education, his training and experience.

Mr. Lowenberg: I will ask your Honor to charge Nos. 12 and 13.

The Court: I will not charge on mere items of testimony. It will take all day for that.

Mr. Lowenberg: I except to your Honor's refusal to so charge. I will ask your Honor to charge No. 15.

The Court: I have already charged that. I told the jury that mere association is not sufficient.

Mr. Lowenberg: I will ask your Honor to charge No. 17.

The Court: It has already been charged at the request of Mr. Barshay.

Mr. Lowenberg: I will ask your Honor to charge No. 21.

The Court: That Eddie Ginsberg was——

Mr. Lowenberg: Yes, that is our contention.

The Court: Denied.

Mr. Lowenberg: Exception. I will ask your Honor to charge No. 22.

The Court: I will charge this, that there is no testimony in this case that the defendant Stemmer was connected with the office of Edward Ginsberg. Is that what you mean?

Mr. Lowenberg: Yes.

The Court: I do not find any testimony in the case to that effect.

[fol. 905] Mr. Lowenberg: Thank you, Judge. I will ask your Honor to charge No. 20.

The Court: That the requests to charge must be considered by the jury as part of the main charge, with the same force as though included in the main charge of this Court. I will charge that.

Is there anything else?

Mr. Cooper: No requests.

The Court: Mrs. Press and Miss Kerr, thank you very much. Under the law only 12 jurors can go into the jury room.

Ladies and gentlemen, you may retire.

(The jury retired at 12:06 P. M.)

The Court: Do you gentlemen want to consent that the jury may have the exhibits if they ask for them?

Mr. Lowenberg: Yes.

Mr. Segal: Yes.

Mr. Barshay: Yes.

(The following stipulations were entered into while the jury was deliberating:)

STIPULATIONS

Mr. Slonim: It is stipulated by counsel for all defendants and the District Attorney that through a clerical error the marking for Exhibit 5-Q was placed on sheet 34 of People's Exhibit 5 for Identification, and pages 32 and 33 of People's Exhibit 5 for Identification were inadvertently not included as part of Exhibit 5-Q in evidence. However, as part of this stipulation it is understood that the only portions of pages 32, 33 and 34 which have been received in evidence and may [fol. 906] be considered as evidence in the case, are those portions of page 32 which show the date, the time, the 'phone numbers and the first out and in, ending with "What's cooking," and the handwriting of Police Officer Jove identifying the voices as Pete and Harvey, and the portions of the conversations listed on page 34 of Exhibit 5-Q, beginning with the third line, "Will get a real tough team," etc., down to the end of the conversation.

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It is also stipulated and consented by counsel for the People and all defendants that People's Exhibits 5-A through 5-R in evidence, inclusive, may be handed to the jury for their consideration in the jury room.

It is consented and stipulated further that portions of the documents on which these exhibits appear may be masked by the Clerk of the Court to the satisfaction of counsel, and that they have been so masked to the satisfaction of counsel, and that the exhibits are presently in condition to the satisfaction of counsel on both sides to be given to the jury.

It is further consented and stipulated by counsel for both sides that as to Exhibits 5-A, 5-Q and 5-R, in lieu of the original notes which have been received in evidence, in view of the difficulty of masking these, that typewritten copies and transcripts may be substituted and given to the jury in place of the original exhibits.

It is further noted on the record that these typewritten transcripts have been compared by counsel for the defense with the original notes, and that they are satisfied that these are fair and accurate transcripts of the original notes.

[fol. 907] The Clerk: Do you consent that the exhibits as masked and/or substituted to the satisfaction of your counsel be given to the jury as requested by them?

Defendant Stemmer: Yes.

Defendant Krakower: Yes.

Defendant Zarowitz: Yes.

The Clerk: Do counsel consent to the jury also having a magnifying glass for use, as requested by them?

Mr. Lowenberg: That is consented to.

The Clerk: Those exhibits will be sent in to the jury at 3:15 P. M.

(The jury returned to the court room at 4:33 P. M.)

REQUESTS BY JURORS

The Clerk: Ladies and gentlemen, have you agreed upon a verdict?

The Foreman: We have not.

The Clerk: Be seated, Mr. Schwam, please.

The Court: I have a communication from you in writing which reads:

"We wish the Judge's charge in respect to the witness Jove."

If I understand you correctly, I believe you mean my charge with respect to the evidence necessary to corroborate the testimony of an accomplice. Is that what you have in mind?

Jurors: That is right.

The Court: All the jurors agreed that is what you have in mind?

Jurors: That's right.

The Second Juror: Your Honor, maybe that is not quite clear. What we are trying to get at is your direction as [fol. 908] regards this expert's testimony.

Can I go further and make myself clearer, perhaps?

A Juror: I think so.

The Second Juror: We want to know, inasmuch as you referred to this man as an expert, there are some that didn't get it clearly, as to how it was we could take his testimony, as to how much——

The Court: I said to you that the witness Jove, or his testimony, may be considered as expert testimony. I do not believe that he precisely comes within the purview of expert testimony as we generally know it and apply it.

In view of the fact that the witness Jove was examined with respect to his qualifications, I gave you the rule which refers to expert testimony.

Jove was qualified as a person who was able to intercept telephonic communications, and he testified that he had made 20 or 25 such installations, and intercepted telephonic communications on 20 to 25 occasions. Hence, he may be classified among those who are skilled in a particular science or field of endeavor.

When an expert takes the stand, you are to consider his qualifications and experience, and his training in that particular field of endeavor. If you find that Officer Jove is telling the truth, if you find, as I said to you in my charge, that Officer Jove identified the voices of these defendants and the witness Alvin Paris, if you are satisfied beyond a reasonable doubt from the testimony he gave that he did [fol. 909] identify these voices after hearing them during the alleged conversations and subsequent conversations, then you are to consider his testimony.

If you are not satisfied beyond a reasonable doubt that Officer Jove properly identified these voices, or even if he did identify the voices, that the defendants did not make, in substance, the statements attributed to them in these tele-

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phonic communications, then you cannot consider his testimony.

On the other hand, if you are satisfied beyond a reasonable doubt that he overheard these defendants make these statements, and you are satisfied beyond a reasonable doubt that he identified the voices of these defendants, then it is for you to say how much weight and credence you will give to his testimony and to the statements.

Now, I will repeat to you, if you wish, the rule of law concerning the testimony necessary to corroborate the testimony of an accomplice, if that is included in your request. Is it?

The Second Juror: No, I don't think that is necessary.

The Court: Do you want me to elaborate on expert testimony or do I make myself clear?

The Second Juror: There seem to be some that wish you to elaborate on accomplice testimony, or on the question of expert testimony.

Jurors: The question of expert testimony.

The Court: The law of this State permits those who are skilled in a particular science of a particular field of endeavor to testify not only to facts but to give their opinions upon questions of a particular scientific nature or their particular field of endeavor. This is allowed because ex- [fol. 910] perts are supposed from their experience, their research and their study to have peculiar knowledge upon the subject of their inquiry, and experts are thus supposed to be more capable than the average, ordinary layman of drawing conclusions from facts and to base their opinions therefrom.

In determining the value of the testimony of experts, you are to consider their learning, their experience, their training and their opportunity for such study and for such experience.

It is of importance that the facts from which the expert draws his conclusions shall be found satisfactorily established. You are also to consider whether the expert is disinterested, unbiased and otherwise credible.

One of the purposes of expert testimony is to aid the jury in their deliberations and in their review of the evidence.

Expert testimony should not be accepted or rejected inconsiderately, but it is to be weighed and considered by you the same as any other evidence, and after weighing and con-

sidering the testimony, you are at liberty to disbelieve it when it is improbable or when it is discredited or when you believe that the expert witness has testified falsely or was mistaken.

The weight to be given to the testimony of any expert is a question to be determined by the jury. The testimony of an expert witness is entitled to the same credit and is to be governed by the same rules as are applied to evidence of other witnesses, and should have such weight with the jury as they believe it is entitled to.

[fol. 911] Where an expert of integrity and skill states his conclusions, which are the necessary and even usual results of facts upon which his opinion is based, the evidence should not be lightly estimated or hastily discredited.

In the final analysis, however, the question of fact at issue is not for the expert to decide but for the jury to decide.

Does that clarify it?

Jurors: Very much.

The Court: You may retire.

Mr. Barshay: May I take an exception?

The Court: To the charge on expert testimony?

Mr. Barshay: I will take an exception to the charge on expert testimony and to the statements of the Court that Mr. Jove was offered as an expert. Mr. Jove was not offered as an expert. He was offered as any other witness, and is to be judged by the regular rules.

The Court: Mr. Barshay, I told the jury that from the examination of this witness he was qualified as a person competent to make interception of telephonic communications. I do not know as a matter of law that there are such experts, but from the way he was examined and cross examined as to his qualifications, the jury is entitled to the law concerning expert testimony.

Please sit down, Mr. Lowenberg.

Mr. Lowenberg: Yes, your Honor.

The Court: Now, I was asked to charge at the close of the case, asked to tell the jury to consider his learning and his qualifications as to voice, as to experience and all the other things that go to make up an expert.

[fol. 912] Now, I am inclined to agree with you that there may not be such specific experts. I say to you and say to the jury they are to consider his testimony and weigh his testimony the same as the testimony of any other witness. And I go further and I say again that if this jury believes

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beyond a reasonable doubt that Officer Jove identified these voices after listening to them over the telephone, and after listening to these defendants, and he thinks they are identical, they are to give the testimony such weight as they see fit.

Mr. Barshay: Now, may I take further exception to the Court's statement, which perhaps was said unintentionally, that they may take into consideration whether Jove identified the voice of Paris and the defendants. Whether he identified the voice of Paris is not an issue here.

The Court: The telephone communications, Mr. Barshay, refer to Alvin Paris's voice, and they are to give the telephonic communications wherein Paris's voice is alleged to have been heard such weight as they see fit, if the witness has identified Paris's voice, the same as he has identified the other voices. If he has not identified Paris's voice, then the conversation and telephonic communication is no good. Do you get my point?

Mr. Barshay: I get your point, sir, and I respectfully disagree, because the identification by Mr. Jove of Paris's voice is no longer, and never was an issue in this case. Paris admitted it was his voice. The issue is whether or not, when he identified the voice of my client——

The Court: If Paris's voice is not an issue, then I think you are right about that. I will modify my charge in [fol. 913] that respect, although I think it is academic.

Mr. Lowenberg: May I note some exceptions on behalf of the defendant Stemmer?

The Court: What are you excepting to?

Mr. Lowenberg: The same definition, that he may be considered as an expert. Your Honor has qualified it, but I wanted to protect the record. But I am going to ask your Honor in addition to charge—I don't know whether your Honor will or not—that it is clear that the witness Jove——

Mr. Monaghan: Your Honor, if this is an additional charge, I respectfully ask that it be——

The Court: You may have an exception to what I have to say.

Mr. Lowenberg: All right. I will note my exception.

Mr. Segal: May I suggest this, your Honor: When you said you would so modify it, would you advise the jury what you mean when you say you modify it?

The Court: I was under the impression that the witness Jove in this trial also testified to identifying Paris's

voice. I am reminded of the fact that he did not so testify at this trial. If he did not, then in that respect I modify it.

Mr. Monaghan: Your Honor, I believe——

Mr. Lowenberg: The testimony was——

The Court: It is academic. Is there anything else?

Mr. Lowenberg: That is all.

The Court: You may retire.

(The jury retired at 4:45 P. M.)

The Court: Bring the jury back.

[fol. 914] (The jury then immediately returned to the court room.)

The Court: In view of Mr. Barshay's statement, the thought just occurred to me that I was probably in error with respect to classifying Jove as an expert. The expert part of his testimony is the connecting of the apparatus and the installations. That would be the only expert part of his testimony, as I view it.

The experience he may have had in listening to the interception of telephonic communications, and to listening to voices, may be considered by you in giving him such weight, giving his testimony such weight as you think it deserves.

I am going to modify my charge to you in view of the fact that it is called to my attention now and I think about it again—I am going to modify my charge to you and ask you to disregard my charge to you so far as the witness Jove is concerned in considering him as an expert, disregard it except in the manner in which the apparatus was installed and connected, so that he could listen to and overhear these conversations.

You may take into consideration, however, his experience in listening to these conversations and give it such weight as you think it deserves.

And so I say to you again you have observed the demeanor and the deportment and the conduct and the manner of the testimony of Officer Jove, and you will decide as a question of fact whether Officer Jove heard these conversations, whether he recognized the voices later on, and whether he identified the voices later on, and if you are satisfied beyond a reasonable doubt from Officer Jove's [fol. 915] testimony that the voices which he heard over the telephone are identical with those of the defendants, then you will give the testimony concerning those telephone communications such weight as you think they deserve.

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You may retire.

Mr. Barshay: I want to ask one question of the Court.

The Court: Yes.

Mr. Barshay: I think your Honor did not intend to limit himself to what they may take into consideration with respect to accepting or rejecting the testimony of Jove, but they may take into consideration his whole testimony, direct and cross.

The Court: There is no doubt about it, all of the testimony on his entire examination, on his voir dire before he gave testimony concerning these conversations.

Mr. Barshay: His entire testimony.

The Court: His entire testimony, direct and cross.

Mr. Barshay: And with respect to that, they may take into consideration all the other evidence in the case which modifies it in any way or cancels it out or rejects it.

The Court: The juror just asked me about Jove's testimony. We are only talking about that.

You may retire.

(The jury retired at 4:52 P. M. and returned to the court ro-m at 5:27 P. M.)

The Clerk: Will you please rise, Mr. Schwam. Have you ladies and gentlemen agreed upon a verdict?

[fol. 916] The Foreman: No.

The Clerk: Be seated, please.

The Court: I have this request from you, which reads: "May we have the indictment?"

The indictment is not in evidence, and if it is not in evidence I cannot give it to you. I assume from this you want to know specifically what the charges are against each of the defendants. Is that correct?

Jurors: That is correct.

The Court: Under those circumstances, I will read to you the substance of the charge against each of the defendants again. Would that satisfy your purpose?

Jurors: Yes.

The Court: Bearing in mind that an indictment is not evidence of a defendant's guilt but an accusation by the Grand Jury accusing a defendant or defendants of a crime or crimes, the defendant Stemmer stands indicted before you of the crime of bribing a participant in a professional football game in violation of Section 382 of the Penal Law, and

it reads as follows, the first count of the indictment, which is the charge against the defendant Stemmer only:

"One Alvin J. Paris, in the County of New York, from on or about December 9, 1946, to on or about December 11, 1946, promised and offered a professional football player, to wit, Merle Alison Hapes, a member of the New York Football Giants, the sum of $2,500. in currency of the United States of America, and promised and offered to bet and wager for the benefit of said Merle Alison Hapes, the sum [fol. 917] of $1,000., with intent to influence said Merle Alison Hapes to lose and try to lose and cause to be lost a professional football game between the Chicago Bears and the New York Giants, to be played on December 15, 1946, in the County of New York, in which game the said Merle Alison Hapes was to be a player and participant."

And the defendant Harvey Stemmer was "concerned in the commission of said bribery and felony by Alvin J. Paris, in the manner and form aforesaid, in that" he "aided, assisted and abetted said Alvin J. Paris in its commission, and directly and indirectly counselled, commanded, induced and procured said Alvin J. Paris to commit said bribery and felony." That is the first count.

Under the second count of the indictment all three defendants are charged with a violation of Section 382 of the Penal Law, in that from on or about December 10, 1946 to on or about December 11, 1946, Alvin Paris promised and offered Francis Filchock a similar amount and wager, with intent to influence him to lose or cause the game to be lost, and wherein the defendants, all defendants, are charged with being concerned in the commission of said promise or offer to Francis Filchock by aiding, assisting, abetting, or directly or indirectly counselling, commanding, inducing and procuring Paris to commit the bribery or promise or offer. The three defendants are charged with aiding, abetting and assisting and inducing Paris to make the offer to Filchock. [fol. 918] Under the third count of the indictment all three defendants are charged with the crime of conspiracy, which is a misdemeanor, and it reads as follows:

"Said defendants, in the County of New York, from on or about December 9, 1946 to on or about December 14, 1946, conspired to commit the crime of Bribery of Participants in Professional Games, in violation of section 382 of the

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Penal Law, and to commit acts injurious to the public morals, in that said defendants, while acting in concert with one Alvin J. Paris, unlawfully conspired to promise and offer professional football players Merle Alison Hapes and Francis Joseph Filchock, members of the New York Football Giants, the sum of $2,500. in currency of the United States of America, and promised and offered to bet and wager for the benefit of said Merle Alison Hapes and Francis Joseph Filchock, the sum of $1,000., with intent to influence" them to lose and try to lose and cause the game to be lost.

The first overt act is that "In furtherance of said conspiracy and to effect the objects thereof, on or about December 10, 1946, in the County of New York, said conspirator Alvin J. Paris met and conferred with said professional football player Merle Alison Hapes, in premises 56 West 56th Street.

And the second overt act is that "In furtherance of said conspiracy and to effect the objects thereof, on or about December 10, 1946, in the County of New York, said conspirator Alvin J. Paris met and conferred with the said professional football player Francis Joseph Filchock."

[fol. 919] Those are the three counts in the indictment. The first count is a bribery count in which only the defendant Stemmer is charged with aiding and abetting Paris.

The second count is a bribery count, in which all three defendants are charged with aiding and abetting Paris in offering Filchock a bribe.

The third count is a misdemeanor, charging all three defendants with conspiring to bribe the football players Filchock and Hapes.

Does that clarify the situation?

Jurors: Yes.

The Court: You may retire.

(The jury retired at 5:33 P. M. and returned to the court room at 8:56 P. M.)

Verdicts

The Clerk: The Foreman will please rise. Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: With respect to the defendant Harvey Stemmer, as to the first count of the indictment, charging the

crime of bribery, how say you, do you find him guilty or not guilty?

The Foreman: Guilty.

The Clerk: With respect to the second count of the indictment, charging the crime of bribery, how say you, do you find him guilty or not guilty?

The Foreman: Guilty.

The Clerk: With respect to the third count of the indictment, charging the crime of conspiracy, how say you, do you find the defendant guilty or not guilty?

The Foreman: Guilty.

[fol. 920] The Clerk: With respect to the defendant David Krakower, on the second count of the indictment, charging the crime of bribery, how say you, do you find him guilty or not guilty?

The Foreman: The first, not guilty.

The Clerk: The second count.

The Foreman: The second count, guilty on the second count.

The Clerk: With respect to the third count of the indictment, charging the crime of conspiracy, how say you, do you find him guilty or not guilty?

The Foreman: Guilty.

The Clerk: With respect to the defendant Jerry Zarowitz, as to the second count of the indictment, charging the crime of bribery, how say you, do you find him guilty or not guilty?

The Foreman: Not guilty.

The Clerk: With respect to the third count of the indictment, charging the crime of conspiracy, how say you, do you find him guilty or not guilty?

The Foreman: Guilty.

The Clerk: Now, hearken unto your verdict as it stands recorded, you say you find the defendant Harvey Stemmer guilty of the crimes of bribery as charged in the first and second counts of the indictment, and the crime of conspiracy, as charged in the third count of the indictment, and so say you all.

The Foreman: Yes.

The Clerk: Now, with respect to the defendant David Krakower, you say you find the defendant David Krakower guilty of the crime of bribery, as charged in the second count, [fol. 921] and conspiracy, as charged in the third count, and so say you all.

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The Foreman: Yes.

The Clerk: With respect to the defendant Jerry Zarowitz, you say you find the defendant Jerry Zarowitz not guilty of the crime of bribery, as charged in the second count, and guilty of the crime of conspiracy, as charged in the third count, and so say you all.

The Foreman: We do.

POLLING OF JURY

Mr. Lowenberg: If the Court please, may I have the jury polled on behalf of the defendant Stemmer?

The Court: Poll the jury. Have the defendant sit down.

The Clerk: May I poll as to all while we are at it?

The Court: As to each one separately.

The Clerk: Ladies and gentlemen, you say through your Foreman that you find the defendant Harvey Stemmer guilty of the crimes of bribery, as charged in the first and second counts of the indictment, and guilty of the crime of conspiracy, as charged in the third count of the indictment. Herman Schwam, is that your verdict?

The Foreman: It is.

The Clerk: Harry Haber, is that your verdict?

The Second Juror: Yes, sir.

The Clerk: Irving Newman, is that your verdict?

The Third Juror: Yes, sir.

The Clerk: Hilda Rothstein, is that your verdict?

The Fourth Juror: It is.

[fol. 922] The Clerk: Augusta G. Gottheimer, is that your verdict?

The Fifth Juror: Yes.

The Clerk: Adolph Goldner, is that your verdict?

The Sixth Juror: It is.

The Clerk: Alden Thompson, is that your verdict?

The Seventh Juror: It is.

The Clerk: Frederick W. Thomas, is that your verdict?

The Eighth Juror: Yes, it is.

The Clerk: Fred F. Kuhn, is that your verdict?

The Ninth Juror: It is.

The Clerk: Haskell Etkin, is that your verdict?

The Tenth Juror: It is.

The Clerk: Irving Schoenholz, is that your verdict?

The Eleventh Juror: Yes, sir.

The Clerk: Abraham Juskowitz, is that your verdict?

The Twelfth Juror: It is.

The Clerk: Now, hearken unto your verdict as it stands recorded, you say you find the defendant Harvey Stemmer guilty of the crimes of bribery as charged in the first and second counts of the indictment, and of the crime of conspiracy, as charged in the third count, and so say you all.

You also say through your foreman that you find the defendant David Krakower guilty of the crime of bribery, as charged in the second count, and of conspiracy as charged [fol. 923] in the third count. Herman Schwam, is that your verdict?

The Foreman: It is.

The Clerk: Harry Haber, is that your verdict?

The Second Juror: It is; yes, sir.

The Clerk: Irving Newman, is that your verdict?

The Third Juror: Yes, sir.

The Clerk: Hilda Rothstein, is that your verdict?

The Fourth Juror: It is.

The Clerk: Augusta G. Gottheimer, is that your verdict?

The Fifth Juror: Yes.

The Clerk: Adolph Goldner, is that your verdict?

The Sixth Juror: It is.

The Clerk: Alden Thompson, is that your verdict?

The Seventh Juror: It is.

The Clerk: Frederick W. Thomas, is that your verdict?

The Eighth Juror: It is.

The Clerk: Fred F. Kuhn, is that your verdict?

The Ninth Juror: It is.

The Clerk: Haskell Etkin, is that your verdict?

The Tenth Juror: It is.

The Clerk: Irving Schoenholz, is that your verdict?

The Eleventh Juror: Yes, sir.

The Clerk: Abraham Juskowitz, is that your verdict?

[fol. 924] The Twelfth Juror: It is.

The Clerk: Now, hearken unto your verdict as it stands recorded, you say you find the defendant David Krakower guilty of the crime of bribery, as charged in the second count, and of conspiracy as charged in the third count, and so say you all.

Now, you say through your Foreman that you find the defendant Jerry Zarowitz not guilty of the crime of bribery, as charged in the second count, and guilty of the crime of conspiracy, as charged in the third count.

Herman Schwam, is that your verdict?

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The Foreman: It is.
The Clerk: Harry Haber, is that your verdict?
The Second Juror: Yes, sir.
The Clerk: Irving Newman, is that your verdict?
The Third Juror: Yes, sir.
The Clerk: Hilda Rothstein, is that your verdict?
The Fourth Juror: It is.
The Clerk: Augusta G. Gottheimer, is that your verdict?
The Fifth Juror: Yes.
The Clerk: Adolph Goldner, is that your verdict?
The Sixth Juror: It is
The Clerk: Alden Thompson, is that your verdict?
The Seventh Juror: It is.
The Clerk: Frederick W. Thomas, is that your verdict?
The Eighth Juror: It is.
[fol. 925] The Clerk: Fred F. Kuhn, is that your verdict?
The Ninth Juror: It is.
The Clerk: Haskell Etkin, is that your verdict?
The Tenth Juror: It is.
The Clerk: Irving Schoenholz, is that your verdict?
The Eleventh Juror: Yes, sir.
The Clerk: Abraham Juskowitz, is that your verdict?
The Twelfth Juror: It is.
The Clerk: Now, hearken unto your verdict as it stands recorded. You say you find the defendant Jerry Zarowitz not guilty of the crime of bribery and guilty of the crime of conspiracy, as charged in the third count, and so say you all.

(The defendants were then sworn and their pedigrees taken.)

Mr. Lowenberg: May I ask, your Honor, the privilege of reserving all motions until the day of sentence?
The Court: April 2nd.
The Clerk: April 2nd for sentence. Motions reserved.
Mr. Segal: May I make the same motion on behalf of the defendant Krakower?
The Court: Yes.
Mr. Barshay: The same with respect to Zarowitz.
Mr. Segal: Will your Honor entertain a motion at this time to continue the bail of Krakower? The bail is $35,000.
The Court: Bail is not continued with respect to any [fol. 926-962] defendant. All defendants are committed.

The Clerk: April 2nd for sentence. The defendants are committed. Motions reserved.

[fol. 963] APPELLATE DIVISION OF THE SUPREME COURT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of February, 1948.

Present: Hon. David W. Peck, Presiding Justice; Hon. Albert Cohn, Hon. Joseph M. Callahan, Hon. John Van Voorhis, Hon. Bernard L. Shientag, Justices.

574-575

THE PEOPLE OF THE STATE OF NEW YORK, Respt.,

vs.

HARVEY STEMMER and DAVID KRAKOWER, alias DAN KRAMER, alias Peter Krakauer, alias Abe Goldstein, impleaded etc., Applts.

ORDER OF AFFIRMANCE—February 24, 1948

An appeal having been taken to this Court by the defendant Harvey Stemmer and by the defendant David Krakower, from the judgments of the Court of General Sessions of the County of New York, rendered against them on the 2nd day of April, 1947,

[fol. 964] And said appeals having been argued by Mr. Joseph Lonardo of counsel for the appellant Harvey Stemmer, by Mr. Harry G. Anderson of counsel for the appellant David Krakower, and by Mr. Whitman Knapp of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgments so appealed from be and the same are hereby, in all things, affirmed.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 965] COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS OF DEFENDANT HARVEY STEMMER

SIRS:

Please take notice that the above named defendant, Harvey Stemmer, hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division of the Supreme Court, First Judicial Department, made on February 24, 1948, affirming a judgment of the Court of General Sessions, New York County rendered April 2, 1947, convicting the defendant of conspiracy and bribery of participants in professional football games, and from each and every part of the said order and judgment.

Dated: New York, March 1, 1948.

[fol. 966] Yours, etc., Joseph Lonardo, Attorney for Appellant, Harvey Stemmer, 135-26 Northern Boulevard, Flushing, L. I.

To: Honorable Frank S. Hogan, District Attorney of New York County, 155 Leonard Street, New York, N. Y.

Clerk of the Court of General Sessions, New York County.

[fol. 967] COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

CERTIFICATE GRANTING LEAVE TO APPEAL ON BEHALF OF DEFENDANT STEMMER

I, Thomas D. Thacher, Associate Judge of the Court of Appeals, do hereby certify that in the record of proceedings in the Court of General Sessions of the City of New York, County of New York, in the cause of The People of the State of New York against Harvey Stemmer, questions of law are involved which ought to be reviewed by the Court of Appeals.

Dated: New York, February 27, 1948.

Thomas D. Thacher, Associate Judge of the Court of Appeals.

[fol. 968] COURT OF GENERAL SESSIONS, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS OF DEFENDANT DAVID KRAKOWER

SIRS:

Please take notice that the above named defendant, David Krakower, hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division of the Supreme Court, First Judicial Department, made on February 24, 1948, affirming a judgment of the Court of General Sessions, New York County rendered April 2, 1947, convicting the defendant of conspiracy and bribery of participants in professional football games, and from each and every part of the said order and judgment.

Dated: New York, March 1, 1948.

[fol. 969] Yours, etc., Harry G. Anderson, Attorney for Appellant, David Krakower, 70 Pine Street, New York 5, N. Y.

To: Honorable Frank S. Hogan, District Attorney of New York County, 155 Leonard Street, New York, N. Y.

Clerk of the Court of General Sessions, New York County.

[fol. 970] COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

CERTIFICATE GRANTING LEAVE TO APPEAL ON BEHALF OF DEFENDANT KRAKOWER

I, Thomas D. Thacher, Associate Judge of the Court of Appeals, do hereby certify that in the record of proceedings in the Court of General Sessions of the City of New York, County of New York, in the cause of The People of the State of New York against David Krakower, questions of law are involved which ought to be reviewed by the Court of Appeals.

Dated: New York, February 27, 1948.

Thomas D. Thacher, Associate Judge of the Court of Appeals.

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[fols. 971-972] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

Joseph Lonardo, being duly sworn, deposes and says:

That he is one of the attorneys for the defendants-appellants in the above entitled action.

That no opinion was rendered by the Appellate Division in affirming the Order and Judgment of the Court of General Sessions of the County of New York, rendered against them.

Joseph Lonardo.

Sworn to before me this 18 day of April, 1948. Jacob Herman, Notary Public, N. Y. County. Commission expires 3/30/49.

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[fol. 973] COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 24th day of November in the year of our Lord one thousand nine hundred and forty-eight before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 24, 1948

[fol. 974] THE PEOPLE &c., Respondent

ag'st

HARVEY STEMMER and DAVID KRAKOWER &c., Appellants

Be it Remembered, That on the 22nd day of September in the year of our Lord one thousand nine hundred and forty-eight, Harvey Stemmer and David Krakower &c., the appellants in this cause, came here unto the Court of Appeals, by Joseph Lonardo and Harry G. Anderson, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Harry G. Anderson and Harris B. Steinberg of counsel for the appellant Krakower, Mr. Joseph Lonardo of counsel for the appellant Stemmer, and by Mr. Whitman Knapp of counsel for the respondent, and after due delibe[illegible]tion had thereon, did order and adjudge that the jud[illegible]nt of the Appellate Division of the Supreme Court a[illegible]ed from herein be and the same hereby is affirmed. Upon this appeal the following question was presented and necessarily passed upon. The appellants [fol. 975] contended that the receipt in evidence of wire tapped telephone calls was illegal because of Section 605 of the Federal Communications Act of 1934 (47 U. S. C.

605). This Court held to the contrary. (See Matter of Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15.)

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of General Sessions of the County of New York—there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of General Sessions of the County of New York before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Court of General Sessions before the Judges thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 976] Court of Appeals, Clerk's Office,
Albany, November 24, 1948:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

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[fol. 975] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 567

HARVEY STEMMER, Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ORDER ALLOWING CERTIORARI—Filed April 4, 1949

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 976] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 568

DAVID KRAKOWER, Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ORDER ALLOWING CERTIORARI—Filed April 4, 1949

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 977] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed April 8, 1949

It Is Stipulated by and between the attorneys for the petitioners, David Krakower and Harvey Stemmer, and the District Attorney of the County of New York as follows:

Pursuant to Rule 13, Subdivision 9, of the Rules of the Supreme Court, the following portions of the record in the Court of Appeals are to be printed and to be deemed the record on appeal in these cases:

Pages 1 to 8, inclusive.
Pages 17 to 23, inclusive.
Pages 538 to 668, inclusive.
Pages 855 to 926, inclusive of 1st 4 lines on 926.
963 to 971, inclusive.
Pages 973 to 974, inclusive.

Dated, New York, April 7, 1949.

Whitman Knapp, Attorney for Respondent. [Signatures illegible] Counsel for Harvey Stemmer.

Harry G. Anderson, Harris B. Steinberg, Counsel for David Krakower.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM 1948

No. 568

DAVID KRAKOWER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

HARRY G. ANDERSON,
70 Pine Street,
New York, N. Y.

HARRIS B. STEINBERG,
150 Broadway,
New York, N. Y.

Attorneys for Petitioner

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Supreme Court of the United States

OCTOBER TERM 1948

No.

DAVID KRAKOWER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the United States:

The petitioner, David Krakower, prays that a *writ of certiorari* issue to review the judgment of the Court of Appeals of the State of New York, which, in turn, affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, affirming a judgment by the Court of General Sessions of the County of New York, convicting petitioner of the crimes of bribery (New York Penal Law, Sec. 382), and conspiracy [New York Penal Law, Sec. 580 (6)].

Statement on Jurisdiction

The jurisdiction of this Court is invoked under Section 1257 of the Revised Judicial Code. The judgment of the

Court of Appeals of the State of New York, which was a final judgment under the laws of that State, was entered on November 24, 1948.

Opinions Below

The Appellate Division of the Supreme Court wrote no opinion, but one of the concurring Justices noted that he voted to affirm "on the authority of *Harlem Check Cashing Corp'n.* v. *Bell,* 296 N. Y. 15" (273 App. Div. 874).

The Court of Appeals likewise affirmed without opinion, but with the following notation (298 N. Y. 728):

> "Judgment affirmed. Upon this appeal the following question was presented and necessarily passed upon: The appellants contended that the receipt in evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U. S. Code, tit. 47, Sec. 605). This court held to the contrary. (See *Matter of Harlem Check Cashing Corp.* v. *Bell,* 296 N. Y. 15.) No opinion."

Summary Statement of Matter Involved

The petitioner, with two others, was indicted and convicted of the crimes of conspiracy and bribery of participants in professional games. This prosecution, and the investigation which preceded it, was entirely based, directly and indirectly, on evidence derived by tapping telephone conversations, transcribing both interstate and intrastate messages which were thereby intercepted, and divulging the contents of these talks at the petitioner's trial.

It appears that New York City police officers, assigned to an investigation of bookmaking, tapped the telephone wires of supposed participants in illegal horse race bet-

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ting, in order to obtain evidence of such violations. The person whose wires were tapped were not defendants in the present case. The tapping was done pursuant to an *ex parte* order by a New York Supreme Court Justice, who purported to act under the authority conferred upon him by New York Constitution, Article 1, Section 12, and New York Code of Criminal Procedure, Section 813-a.[1]

The police intercepted and transcribed numerous intrastate conversations between persons in New York City, and interstate ones between persons in New York and in New Jersey. Among the conversations were a number in which one Alvin Paris participated, several in which petitioner is alleged to have participated, and others in which petitioner was mentioned. Information was derived therefrom that a plan was afoot to offer bribes to two professional football players to induce them to attempt to cause their team to lose a certain game, and thus allow the conspirators to engineer a profitable betting *coup*. Before the date of the game, Alvin Paris was arrested and charged with bribery. After a trial, in which he denied his guilt, and at which testimony of the tapped telephone conversations was introduced, he was convicted. Before sentence, and in hopes of obtaining leniency, he conferred with the prosecutor, who confronted him with additional wiretaps. Paris agreed to turn State's evidence, and testified against petitioner and his co-defendants at the trial of the latter.

At that trial, the evidence against petitioner and his co-defendants consisted of the testimony of the convicted accomplice, Paris, which was, at least indirectly, attributable to wiretapping [*cf. Nardone* v. *United States* (1939)

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1 Both the State Constitutional provision and the Criminal Code section were adopted *subsequent* to the passage of the Federal Communications Act of 1934, and its construction, for the first time, in *Nardone* v. *United States* (1937) 302 U. S. 15.

308 U. S. 338], and the corroborative testimony of Patrolman Jove, who had tapped the wires, and who introduced into evidence the notes, *in extenso,* which he had made of seventeen of the intercepted conversations (Peo's. Exhs. 5-A to 5-H, 5-J to 5-R, incl.).[2] Jove's testimony, of course, was the direct divulgence in court of the contents of tapped calls.

Under the law of New York, no conviction may be had on the uncorroborated evidence of an accomplice (New York Code of Criminal Procedure, Sec. 589). The trial court charged that Paris was an accomplice as a matter of law (2675), and that, unless the jury believed that the necessary corroboration was to be found in the wiretapping testimony of Patrolman Jove, they must acquit (2681-2, 2705).

Timely and specific objection was made to Jove's testimony on the ground that it violated the provisions of Section 605 of the Federal Communications Act. The objection was overruled and exception noted (1643-5).

Statutes Involved

The statutes involved are:

(1) Section 605, Federal Communications Act of 1934 (47 U. S. C., Sec. 605);

(2) New York Constitution, Article 1, Section 12;

(3) New York Code of Criminal Procedure, Section 813-a.

They are set forth in the Appendix to this Petition and Brief.

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2 References in parentheses, unless otherwise indicated, are to folios of the printed Record on Appeal in the State Court.

Question Presented:

Does the prohibition against divulgence of the contents of tapped telephone messages, contained in the Federal Communications Act, apply to the receipt of such evidence in State Courts, as well as in Federal Courts?

Reasons for the Allowance of the Writ

The broad policy of the Federal Communications Act, which makes it criminal to tap a telephone wire, or to divulge the contents of an intercepted telephone conversation, has been defined by this Court with undeviating consistency as operating to interdict the indirect use of wiretapping evidence for investigation, as well as direct testimonial use in court (*Nardone* v. *United States, supra,* 308 U. S. 338); its use by law enforcement agents as well as private citizens (*Nardone* v. *United States, supra,* 302 U. S. 379); and the tapping of intrastate as well as interstate telephone messages [*Weiss* v. *United States* (1939) 308 U. S. 321].

Yet, despite this clear exposition of the meaning of Section 605 of the Communications Act, the three State appellate courts which have passed on the question of the admissibility of wiretap evidence, apparently basing their decisions on the fortuitous circumstance that this Court's decisions in wiretapping cases arose, in each instance, on appeals from Federal court trials, have held that Section 605 is not applicable to State court trials, and that wiretap testimony may be received by State tribunals [New York: *Matter of Harlem Check Cashing Corp.* v. *Bell* (1946) 296 N. Y. 15; California: *People* v. *Kelley* (1942) 122 Pac. (2d) 655, affd. 22 Cal. (2d) 169; *People* v. *Vert-*

lieb (1943) 22 Cal. (2d) 193; *People* v. *Onofrio* (1944) 65 Cal. App. (2d) 584; *People* v. *Barnhart* (1944) 66 Cal. App. (2d) 714; MARYLAND: *Hitzelberger* v. *State* (1938) 174 Md. 152; *Rowan* v. *State* (1939) 175 Md. 547; *Hubin* v. *State* (1942) 180 Md. 279, cert. den. 316 U. S. 680].[3]

This Court has never heretofore passed on the question now presented, and, unless it does, the growing practice of wiretapping by State law enforcement agents, and the acceptance of their evidence in State courts, will continue. Moreover, an implication of tacit approval of the practice by this Court would inevitably ensue from a refusal to review the question which is squarely raised in the instant case for the first time.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying Brief, your petitioner prays that a *writ of certiorari* issue out of this Court to the Court of Appeals of the State of New York, commanding that Court to certify and to send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the proceedings below, to the end that the judgment of said Court be reviewed and determined by this Court; that the judgment and decision of the Court of Appeals be reversed; and that your peti-

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3 Examination of the papers on the petition for *certiorari* which was denied in the *Hubin* case, *supra*, 316 U. S. 680, reveals that the question presented by the instant case was not raised there.

tioner be granted such other and further relief as may be proper.

DAVID KRAKOWER

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New York, N. Y., February 8, 1949.

Supreme Court of the United States

OCTOBER TERM 1948

No.

DAVID KRAKOWER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION

POINT I

The Court of Appeals erred in holding that Section 605 of the Federal Communications Act did not forbid the receipt in evidence of wiretapped telephone calls.

The Court of Appeals rejected the contention that Section 605 of the Federal Communications Act applied to State courts, as well as to Federal courts, in its prohibition against the receipt in evidence of wiretapped telephone calls—both interstate and intrastate in character. In this, it manifestly erred.

A. *The adoption of Section 605 of the Federal Communications Act of 1934 outlawed the reception of wiretap evidence in State, as well as Federal, courts.*

Section 605 provides, in its "critical clause" (*Weiss* v. *United States, supra,* 308 U. S. 321, 327) that

> "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Violation of this section is made a substantive crime (47 U. S. C., Sec. 501). It is not, moreover, a mere rule of evidence, applicable only to Federal courts, but it is an expression of the Congressional policy to outlaw unethical methods of gathering evidence. (*Weiss* v. *United States, supra,* 308 U. S. 321, 331; *Nardone* v. *United States, supra,* 302 U. S. 379, 383). As this Court wrote in the *Nardone* case, *supra* (302 U. S., at p. 383):

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

This decision is the "translation into practicality of broad considerations of morality and public well-being" (*Nardone* v. *United States, supra,* 308 U. S. 338, 340).

If, as this Court has held (*Weiss* v. *United States, supra,* 308 U. S., at p. 331):

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"It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony",[4]

then it must follow that all wiretapping, State as well as Federal, must have been banned. If the State courts, with their wide jurisdiction over crimes, are exempted from the operation of the statute, such methods of gathering evidence will flourish. Common sense indicates that no such schizoid approach to an essentially moral and ethical problem could have been intended.

"A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous motive." (*Nardone* v. *United States, supra,* 308 U. S., at p. 341)

See: Rosenzweig, *The Law of Wiretapping,* 33 Cornell L. Q., 77-78.

Accordingly, as a "remedial measure", Section 605 should be given a broad and liberal interpretation in aid of the worthy ends sought to be attained. [*Sablowsky* v. *United States* (C. C. A. 3d Cir. 1938) 101 Fed. (2d) 183, 190]

When Congress enacted the Federal Communications Act, beyond question it created a substantive law, within its powers, dealing with interstate commerce, and excluded

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4 In the last few years, despite a great increase in the number of crimes cognizable in Federal courts (35 *Journal of Crim. Law & Criminology,* 16 *et seq.*) the record of efficacy of Federal prosecutors operating without the aid of wiretapping has been impressive. The U. S. Attorney for the Southern District of New York reports 99.1% convictions in 1947; in the Eastern District of New York convictions in 1947 totalled 96% of trials; and in the Northern District of Illinois the percentage of convictions from July 1, 1946, to June 30, 1947, totalled 95.8%.

any further valid State action on the subject thereafter [*Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Tel. Co.* (C. C. A. 8th Cir. 1930) 45 Fed. (2d) 995, 1000, cert. den. 283 U. S. 822].

Numerous analogies spring to mind, where Congress has enacted substantive legislation, and, despite the lack of express words making the law binding on State courts as well as Federal tribunals, such has been held to be the result, where a contrary conclusion would have, "to a large extent", defeated the "object of its enactment".[5]

Further ground for overriding the State court's unwarranted refusal to follow the policy laid down by the Federal statute is found in the Supremacy Clause—Article VI, Section 2—of the Federal Constitution.

See: *Francis* v. *Southern Pacific Co.* (1948) 333 U. S. 445, 450; *Testa* v. *Katt* (1947) 330 U. S. 386.

B. *The New York rule admitting illegally obtained evidence does not apply to wiretapping testimony.*

Nor can the People rely on the New York rule admitting illegally obtained evidence [*People* v. *Richter* (1943) 291 N. Y. 161; *People* v. *Defore* (1926) 242 N. Y. 13; *People* v.

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5 PROHIBITION AGAINST USE IN EVIDENCE OF STATEMENTS BY BANKRUPT [11 U. S. C. Sec. 25-a (10); *People* v. *Donnenfeld* (2d Dept. 1921) 198 App. Div. 918, affd. 233 N. Y. 526; *People* v. *Lay* (1916) 193 Mich. 17]; EXEMPTION OF INTERNAL REVENUE AGENTS FROM TESTIFYING IN REGARD TO OFFICIAL DUTIES [Sec. 3167, Rev. St. U. S.; *Boske* v. *Comingore* (1900) 177 U. S. 459]; FEDERAL EMPLOYERS LIABILITY ACT PROCEDURAL REGULATIONS [*Minn., St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin* (1931) 283 U. S. 520]; SUSPENSION OF STATUTES OF LIMITATION AS TO SOLDIERS [*Caperton* v. *Bowyer* (1871) 81 U. S. 216, 235; *Stewart* v. *Kahn* (1870) 78 U. S. 493, 505-506]; EXCLUSION OF UNSTAMPED DOCUMENTS FROM EVIDENCE [Act of Congress, July 13, 1866; Sec. 9; *Chartiers & Robinson Turnpike Co.* v. *McNamara* (1872) 72 Pa. 278, 281].

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Adams (1903) 176 N. Y. 351] to justify the receipt of the wiretapping testimony in this case, since testimony of wiretapped conversations is itself a Federal crime.

Thus, Section 605 makes it illegal—on pain of criminal sanctions (47 U. S. C., Sec. 501)—to "divulge" the contents of a tapped message. This Court has noted that the act of testifying as to the contents of a wiretap is itself a "divulgence" which constitutes a violation of the Communications Act (*Nardone* v. *United States, supra,* 302 U. S. 379, 382).

Certainly, there seems to be no sound reason why the criminally proscribed act of divulgence should be permitted in testimony in a State court, and prohibited in a Federal court. Should a State court judge be allowed to condone a Federal crime taking place in his very presence? Obviously not. [See: Note, 7 Fordham L. Rev. 263; Bernstein, *The Fruit of the Poisonous Tree: Civil Liberties and Wire Taps,* 37 Ill. L. Rev. 99, 107-108; Rosenzweig, *The Law of Wire Tapping,* 32 Cornell L. Q. 514, 546.][6]

C. The New York law—constitutional, statutory, and decisional—which purports to legalize supervised wiretapping is void, since it contravenes the Federal statute.

Finally, it is submitted that the New York Court of Appeals, in its decision in *Matter of Harlem Check Cashing Corp.* v. *Bell, supra,* 296 N. Y. 15—upon which it relied in the instant case—erred when it held that wiretap evidence gathered under the aegis of an *ex parte* order made pursuant to Section 813-a of the New York Code of Criminal Procedure and Article 1, Section 12 of the New York Constitution was admissible.

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6 At the 1938 New York Constitutional Convention, one of the delegates, in the debate on the adoption of Article 1, Section 12, pointed out that no State court judge should allow the Federal crime to take place in his courtroom (1 Revised Record, N. Y. State Const. Conv., pp. 550-551.)

The Court of Appeals wrote that it was "not persuaded" that the decision in *Weiss* v. *United States, supra,* 308 U. S. 321, constrained a holding that wiretap evidence, obtained on a court order made "in accordance with the statutes of the State as expressly authorized by the Constitution of the State" (296 N. Y., at p. 17), was illegal. The Court went on to say that, since the State had provided by Constitution and statute for "certain specific methods" of gathering wiretap evidence, it was not to be assumed that "Congress intended to circumscribe that power unless it unequivocally indicated such an intent".

The palpable error in that statement is the fact that Congress acted in 1934, *prior* to the State's adoption in 1938 of its Constitutional and statutory scheme for regulated wiretapping, and therefore the proffered canon of determining Congress' intent is inapplicable. As we have already shown, when Congress acted, it preempted the field, and the State, by *later* adopting its scheme, was doing a void thing, and running counter to the supreme law of the land.

CONCLUSION

The problem posed by this petition is of wide and important application. The clear intent of Congress to ban all wiretapping is being flouted every day by the receipt of such evidence in State courts, a result never intended by the lawmakers. The previous decisions of this Court should be implemented by one in this case to stop a dangerous break in the dike of civil liberties.

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A writ of certiorari should be granted.

Respectfully submitted,

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New York, N. Y., February 8, 1949.

APPENDIX

FEDERAL COMMUNICATIONS ACT

Section 605 of the Federal Communications Act of 1934 (47 U. S. C. A. Sec. 605), insofar as relevant, reads as follows:

"Sec. 605. Unauthorzed publication or use of Communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having

received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *"

NEW YORK STATE CONSTITUTION

Article 1, Section 12, of the New York State Constitution provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

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NEW YORK CODE OF CRIMINAL PROCEDURE

Section 813-a reads in this wise:

"An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. * * *"

Office - Supreme Court
FILED
MAR 25 1949
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1948

Nos. 567, 568

HARVEY STEMMER and

DAVID KRAKOWER alias
DAN KRAMER alias
PETER KRAKAUER alias
ABE GOLDSTEIN

Petitioners

against

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

RESPONDENT'S MEMORANDUM

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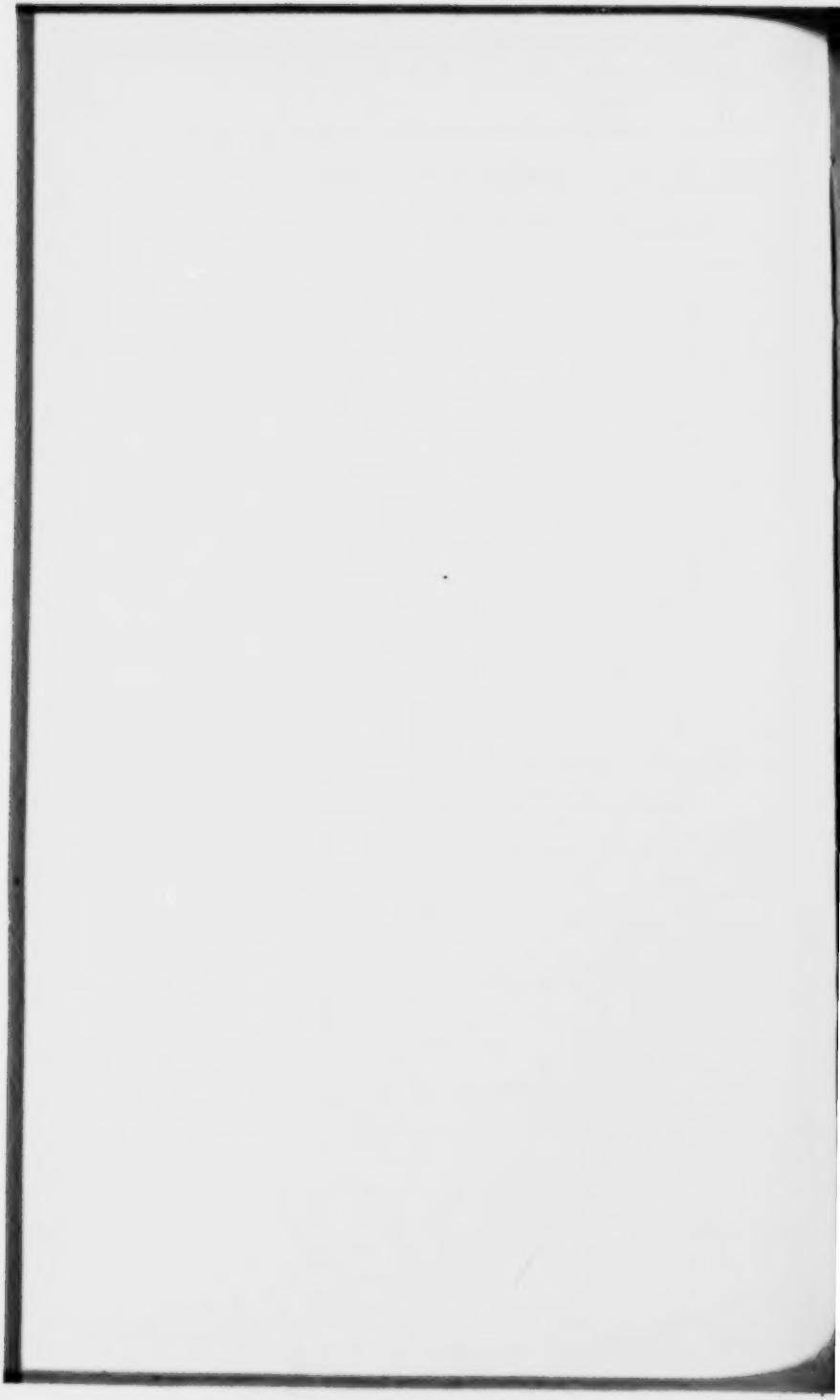

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Supreme Court of the United States

October Term, 1948

Nos. 567, 568

HARVEY STEMMER and

DAVID KRAKOWER alias
DAN KRAMER alias
PETER KRAKAUER alias
ABE GOLDSTEIN

Petitioners

against

THE PEOPLE OF THE STATE OF
NEW YORK

Respondent

RESPONDENT'S MEMORANDUM

Statement

On March 8, 1947, petitioners Stemmer and Krakower were convicted in the Court of General Sessions, New York County, of CONSPIRACY and of BRIBERY OF PARTICIPANTS IN PROFESSIONAL GAMES (record 919-21;* New York Penal Law §§382, 580, subds. 1, 6, appendix 1-2).

* "Record" indicates a page reference to the record, as here filed, of the proceedings below.

On April 2 each was given a suspended sentence for the conspiracy, and sentenced to prison for five to ten years on the bribery (record 955-6). On February 24, 1948, the judgments were unanimously affirmed by the Appellate Division of the New York Supreme Court [record 963-4; 273 App. Div. 854, 77 N. Y. Supp. (2d) 261]. On November 24 they were similarly affirmed by the New York Court of Appeals [record 973-4; 298 N. Y. 728, 83 N. E. (2d) 141]. The State courts, while mentioning a particular State decision as the basis for judgment, rendered no formal opinion [record 971, 973-4; see *Matter of Harlem Check Cashing Corp.* v. *Bell* (1946) 296 N. Y. 15, 68 N. E. (2d) 854]. Petitioners seek certiorari under §1257 (3) of the Judicial Code [Stemmer p. 3, Krakower p. 1; 28 U. S. C. (1948) §1257 (3), appendix 2].

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Introduction

This case involves a ring of professional bookmakers and gamblers in New York City who conspired to "fix" a championship football playoff between the New York Giants and the Chicago Bears by bribing two of the Giant players to "throw" the game. Through certain telephone conversations among them, which police intercepted by authority of three court orders, the plot was discovered and the ring disrupted before the game. Four of the conspirators were identified and arrested. One of them, Alvin Paris, was convicted first in a separate trial. Corroborated by evidence of the intercepted phone conversations, he then testified against the other three, who were also convicted. Of the 16 or 17 phone conversations which were received in evidence, four were interstate, four were intrastate, and the others were of a nature impossible to determine. Two of the conspirators, petitioners Stemmer and Krakower, appealed. The third, Jerry Zarowitz, did not. Petitioners raise no question of due process. Their only claim here, one specifically considered by the New York Court of Appeals, is that the trial court was foreclosed by the Federal Communications Act from receiving the conversations in evidence [Stemmer pp. 4-9, Krakower pp. 5-6, 9-14; see record 548-9, 973-4; 47 U. S. C. (1946) §605, appendix 3].

State Proceedings

On December 2, 1946, in New York City, Lieutenant Arthur L. Morgan of the Manhattan West Borough Headquarters Squad of the New York Police Department went before the Honorable Denis O'L. Cohalan, a Justice of the New York Supreme Court (order Dec. 2, appendix 9-10). Pursuant to the provisions of Article I, Section 12 of the New York State Constitution, and Section 813-a of the New York Code of Criminal Procedure, the officer filed an affidavit with the Court, requesting permission to intercept all telephone calls coming over a certain phone then being used in the commission of crime (affidavit Dec. 2, appendix 6-8, see *id.* 24-25). On this date the court granted the first of the three interception orders (order Dec. 2, appendix 9-10). About a week later, in similar proceedings instituted by another officer, a second Justice granted the two other orders (orders Dec. 10, appendix 14-15, 19-20; see affidavits Dec. 10, appendix 11-13, 16-18).

In 1892, the New York Legislature passed the predecessor to the existing provision of the New York Penal Law, which made the interception of any telephone communication in the state a crime punishable by two years' imprisonment (New York Penal Law §1423, subd. 6, appendix 21; see New York Laws 1892, c. 372; *id.* 1911, c. 316; *cf.* appendix 28, 40). In 1938, however, after discussion of the threat of organized urban crime, a New

York Constitutional Convention proposed the instant crime detection interception provision (convention 827,* see *id.* 369-374, 428-429, 430, 431-432, 479, 498-501, 503, 541-542, 543; appendix 22-23; *cf. id.* 26, 28, 30, 35-36). This provision was subsequently adopted by the people of the State in a general election, and is presently embodied in Section 12 of Article I of the New York Constitution (appendix 24; see New York Consol. Laws, Book 2 (McKinney 1939) p. 98, appendix 23; *cf. id.* 28, 30, 35-37, 40, 46).

This constitutional provision authorizes the use of telephone interceptions by State law enforcement officers under a system of judicial supervision through the issuance of warrants or ex parte court orders (New York Constitution, Art. I, Sec. 12, appendix 24; see affidavits and orders Dec. 2, 10, appendix 5-20; *cf. id.* 34-38, 41, 43, 44, 46). This provision is drawn with limitations against abuse analogous to those surrounding the issuance of warrants under the search and seizure guarantees of the Fourth Amendment to the Constitution of the United States (compare New York Constitution, Art. I, Sec. 12, appendix 24 with United States Constitution, Amend. IV, appendix 4; see also New York Constitution, Art. 1, Sec. 12, New York Civil Rights Law §8, appendix 4; *cf. id.* 35, 41, 45).

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* "Convention" refers either to pages or, where indicated, to documents in the record of the State Constitutional Convention. Citations are to the *Revised Record of the New York State Constitutional Convention* (1938).

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In 1942 the New York Legislature implemented this constitutional provision by the addition of Section 813-a to the Code of Criminal Procedure, defining the procedural steps which State officers are required to follow in order to obtain such judicial permission to intercept (appendix 25; see New York Laws 1942, c. 924; affidavits and orders Dec. 2, 10, appendix 5-20).

Applications for interception orders may be made only by a limited number of such officers, including the attorney general, a district attorney, or a police officer above the rank of sergeant, and must be based on the officer's oath or affirmation (New York Code Crim. Proc. §813-a, appendix 25; see affidavits Dec. 2, 10, appendix 6-8, 11-13, 16-18; New York Constitution, Art. I, Sec. 12, appendix 24; compare United States Constitution, Amend. IV, appendix 4; *cf. id.* 40-41, 46).

The officer must apply to one of a group of judges sitting in various courts of record throughout the State, including the Court of General Sessions, a County Court, or the New York Supreme Court (New York Code Crim. Proc. §813-a, appendix 25; see affidavits and orders, Dec. 2, 10, appendix 5-6, 9-10, 11, 14-15, 16, 19-20; *cf. id.* 34-35, 41, 46).

The telephone line to be intercepted, the person or persons using it, and the purpose of the interception, must be particularly described (New York Code Crim. Proc. §813-a, appendix 25; see affidavits and orders Dec. 2, 10, appendix 6-7, 9-10, 12-15, 17, 19-20; New York Constitution, Art. I, Sec. 12, appendix 24; compare United States Constitution, Amend. IV, appendix 4; *cf. id.* 28).

The judge may examine the officer, or other witnesses, under oath, and shall issue the order only if satisfied as to reasonable grounds (New York Code Crim. Proc. §813-a, appendix 25; see New York Constitution, Art. I, Sec. 12, appendix 24; compare United States Constitution, Amend. IV, appendix 4; *cf.* orders Dec. 2, 10, appendix 9, 14, 19; also *id.* 40-42).

Federal Law

The United States Government has never had a comparable telephone interception procedure. In 1937, in *Nardone* v. *United States,* 302 U. S. 379, the Court held that Congress, by its passage in 1934 of section 605 of the Federal Communications Act, had forbidden entirely the use of such interceptions by federal officers [see *Nardone* case, 302 U. S. at pp. 381-384, Cases Distinguished, appendix 48; also 48 Stat. (1934) 1064, 1103-1104, 47 U. S. C. (1946) §605; appendix 3].

During the years which followed, a number of unsuccessful measures were proposed to change this rule as to federal officers, debate on which measures showed Congress' awareness of the different interception policy adopted by New York State [83 Cong. Rec. (1938) 9453, 86 Cong. Rec. (1940) 9948-9949, 88 Cong. Rec. (1942) 4599, appendix 26-30; see S. 3756 (75th Cong. 3d Sess. 1938), H. J. Res. 571 (76th Cong. 3d Sess. 1940), H. J. Res. 310 (77th Cong. 2d Sess. 1942), appendix 26, 28, 30, and other measures cited *id.* 27, 29, 30].

In 1940 Congress undertook an investigation of all interceptions, including those used in State crime detection, to determine whether or not such practices called for remedial legislation [86 Cong. Rec. (1940) 3116; see S. Res. 224 (76th Cong. 3d Sess. 1940), appendix 31; S. Rept. 1304 (76th Cong. 3d Sess. 1940) pp. 1, 7, appendix 32-33; also 86 Cong. Rec. (1940) 889-890, 2693; *cf.* appendix 42].

A subcommittee held extended hearings, the New York practice was considered, and Congress took no action (hearing 240-241,* 648-650, 659-661, 817-819, appendix 33-46).

* "Hearing" refers to pages in the record of proceedings before the subcommittee of the Senate Committee on Interstate Commerce which investigated State interceptions. Citations are to *United States Wire Tapping Investigation, Senate Hearings* (S. Res. 224, 76th Cong., U. S. Gov't Printing Office 1940-1941).

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POINT I

Certiorari should be denied.

Petitioners claim that the court improperly received the evidence (Stemmer pp. 4-9, Krakower pp. 5-6, 9-14). This is without basis. The interceptions were properly made under State law, and the federal act is without application [see Federal Law *supra* pp. 9-10; *cf.* affidavits and orders Dec. 2, 10, appendix 5-20; New York Penal Law §1423, subd. 6, appendix 21; New York Constitution, Art. 1, Sec. 12, appendix 24; New York Code Crim. Proc. §813-a, appendix 25; State Proceedings *supra* pp. 5-8; also *Leon* v. *State* (1942) 180 Md. 279, 284, 23 Atl. (2d) 706, 709, *cert. den. sub nom. Neal* v. *Maryland*, 316 U. S. 680; Law and Cases, appendix 47].

Certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

CHARLES W. MANNING
WILLIAM HOPPEN
Deputy Assistant District Attorneys

of counsel

March 1949

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APPENDIX

Statutes authorizing conviction

NEW YORK PENAL LAW

§382. Bribery of participants in professional games • • •

Whoever gives, promises or offers to any professional or amateur baseball, football, hockey, polo, tennis or basketball player or boxer or any player who participates or expects to participate in any professional or amateur game or sport or any jockey, driver, groom or any person participating or expecting to participate in any horse race, including owners of race tracks and their employees, stewards, trainers, judges, starters or special policemen, or to any manager, coach or trainer of any team or participant or prospective participant in any such game, contest or sport, any valuable thing with intent to influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory in a baseball, football, hockey or basketball game, boxing, tennis or polo match or a horse race or any professional or amateur sport, or game, in which such player or participant or jockey or driver, is taking part or expects to take part, or has any duty or connection therewith, or who, being a professional or amateur baseball, football, hockey, basketball, tennis or polo player, boxer, or jockey, driver, or groom or participant or prospective participant in any sport or game or a manager, coach or trainer of any team or individual participant or prospective participant in any such game, contest or sport, solicits or accepts any valuable thing to influence him to lose or try to lose or cause to be lost or to limit his or his team's margin of victory in a baseball, football, hockey or basketball game or boxing, tennis or polo match, or horse race or any game or sport in which he is taking part, or expects to take part, or has any duty or connection therewith, is guilty of a felony, punishable by imprisonment for not less than one year, nor more than five years and by a fine of not more than ten thousand dollars. (*New York Laws 1945, c. 602*)

NEW YORK PENAL LAW

§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

• • •

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor.

Statutes invoked for certiorari

UNITED STATES CODE
JUDICIARY AND JUDICIAL PROCEDURE

§1257. State courts • • • certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. [*28 U. S. C. (1948) §1257 (3)*]

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FEDERAL COMMUNICATIONS ACT

§605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [*48 Stat. (1934) 1064, 1103-1104, 47 U. S. C. (1946) §605*]

Searches and seizures

UNITED STATES CONSTITUTION

[*Amendment IV—Searches and Seizures*]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE I OF THE NEW YORK CONSTITUTION

§12. [*Security against unreasonable searches, seizures* • • •]*

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

• • •

NEW YORK CIVIL RIGHTS LAW

§8. *Right of search and seizure*

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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* For the interception part of this Section, see A24.

A5

Telephone interceptions*

State Proceedings

SUPREME COURT—NEW YORK COUNTY

IN THE MATTER
of
INTERCEPTING TELEPHONE
COMMUNICATIONS

AFFIDAVIT AND ORDER

Legal Bureau
POLICE DEPARTMENT, NEW YORK CITY
240 Centre Street
New York City

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* Material in the balance of this appendix follows the arrangement in the text of the brief.

INTERCEPTION ORDER OF DECEMBER 2

Affidavit

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-8020

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARTHUR L. MORGAN, being first duly sworn, deposes and says:

That he is an Acting Lieutenant in the Police Department of the City of New York, assigned to Borough Headquarters Squad, Manhattan West.

That it is part of deponent's duties to make confidential investigations of crime and criminals and to apprehend criminals.

That deponent at the present time is attempting to secure evidence of violations of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, in violation of Section 986 of the Penal Law.

That deponent has been informed by persons in a position to know, and whom he believes to be telling the truth, that one, Sid Paris and other persons whose names are unknown to informants and deponent, are engaged in the

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illegal taking of bets on horse races and other sporting events, in violation of the Penal Law of the State of New York, at premises 56 West 56th Street, City, County and State of New York.

That the source of deponent's confidential information is not divulged in this affidavit, but deponent is ready and willing to disclose the source and nature of this confidential information to the Court.

That deponent has been informed that there is a Private telephone located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and bearing the number Circle 5-8020.

That deponent believes that if he is permitted to intercept the telephone messages being transmitted over telephone Circle 5-8020, he will be able to obtain information against the said Sid Paris and other persons engaged in the illegal taking of bets on horse races and other sporting events.

WHEREFORE, deponent requests an order permitting the Police Commissioner of the City of New York, or a duly authorized agent of the Police Department of the City of New York, to intercept any communications being transmitted over the telephone instrument Circle 5-8020, and permitting the Police Commissioner or his duly authorized representative to tap and make connections with any and all wires leading to and from the telephone instrument bearing the number Circle 5-8020, located at premises 56 West 56th Street, City, County and State of New York, and listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company.

That to deponent's knowledge, no previous application has been made by the Police Department of the City of New York for an order permitting the interception of messages over the aforementioned wire.

(signed) Arthur L. Morgan

Sworn to before me this
2nd day of December, 1946.

(signed) Michael G. O'Rourke

Notary Public, MICHAEL G. O'ROURKE
Bronx Co. Clk's No. 24, Reg. No. 32 O-8
N. Y. Co. Clk's No. 90, Reg. No. 94 O-8
Queens Co. Clk's No. 328, Reg. No. 52-O-8
Kings Co. Clk's No. 38, Reg. No. 75-O-8
Certificate filed in Richmond County
Commission Expires March 30, 1948

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SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-8020

Acting Lieutenant Arthur L. Morgan, assigned to Borough Headquarters Squad Manhattan West of the Police Department of the City of New York, being now present before me and it appearing from his affidavit sworn to on the 2nd day of December, 1946, that there are reasonable grounds to believe that evidence of crime and evidence leading to the detection and apprehension of persons engaged in violation of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing the number Circle 5-8020, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and that the ends of justice will be best served by authorizing the interception of messages; it is

ORDERED, that the Police Commissioner of the City of New York or his duly authorized agents be, and they hereby are authorized and empowered to intercept, listen

to, overhear and make copies of any and all telephonic communications made to and from or being transmitted over telephone instrument bearing the number Circle 5-8020, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, for the purpose of obtaining evidence of the commission of crime and evidence leading to the detection and apprehension of persons engaged in the illegal taking of bets on horse races and other sporting events; and it is further

ORDERED, that the said Police Commissioner of the City of New York, or his duly authorized agents be and they hereby are authorized and empowered to tap and make connections with any and all wires leading to and from the said telephone instrument bearing the number Circle 5-8020, and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted; and it is further

ORDERED, that this order shall be effective until the 2nd day of June, 1947.

Dated: City and County of New York,
December 2nd, 1946.

(signed) D O'L C.
Justice of the Supreme Court
of the State of New York.
DENIS O'L COHALAN

FIRST INTERCEPTION ORDER OF DECEMBER 10

Affidavit

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-7366

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GEORGE W. McGIRR, being first duly sworn, deposes and says:

That he is an Acting Lieutenant in the Police Department of the City of New York, assigned to Borough Headquarters Squad, Manhattan West.

That it is part of deponent's duties to make confidential investigations of crime and criminals and to apprehend criminals.

That deponent at the present time is attempting to secure evidence of violations of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, in violation of Section 986 of the Penal Law.

That deponent has been informed by persons in a position to know and whom he believes to be telling the truth, that "SID" and "MATTY," whose full names are unknown, and other persons whose names are unknown to informants and deponent, are engaged in the illegal taking of bets on horse races and other sporting events, in violation of the Penal Law of the State of New York, at premises 56 West 56th Street, City, County and State of New York.

That the source of deponent's confidential information is not divulged in this affidavit, but deponent is ready and willing to disclose the source and nature of this confidential information to the Court.

That deponent has been informed that there is a private telephone located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and bearing the number Circle 5-7366.

That deponent believes that if he is permitted to intercept the telephone messages being transmitted over telephone Circle 5-7366, he will be able to obtain information against the said "SID" and "MATTY," and other persons engaged in the illegal taking of bets on horse races and other sporting events.

WHEREFORE, deponent requests an order permitting the Police Commissioner of the City of New York, or a duly authorized agent of the Police Department of the City of New York, to intercept any communications being transmitted over telephone instrument Circle 5-7366, and permitting the Police Commissioner or his duly authorized representative to tap and make connections with any and all wires leading to and from the telephone instrument

bearing the number Circle 5-7366, located at 56 West 56th Street, City, County and State of New York, and listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company.

That to deponent's knowledge, no previous application has been made by the Police Department of the City of New York for an order permitting the interception of messages over the aforementioned wire.

(signed) George W. McGirr

Sworn to before me this
10th day of December, 1946.

(signed) Michael G. O'Rourke

Notary Public, MICHAEL G. O'ROURKE
Bronx Co. Clk's No. 24, Reg. No. 32 O-8
N. Y. Co. Clk's No. 90, Reg. No. 94 O-8
Queens Co. Clk's No. 328, Reg. No. 52-O-8
Kings Co. Clk's No. 38, Reg. No. 75-O-8
Certificate filed in Richmond County
Commission Expires March 30, 1948

Order

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-7366

Acting Lieutenant George W. McGirr, assigned to Borough Headquarters Squad, Manhattan West, of the Police Department of the City of New York, being now present before me and it appearing from his affidavit sworn to on the 10th day of December, 1946, that there are reasonable grounds to believe that evidence of crime and evidence leading to the detection and apprehension of persons engaged in violation of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, may be obtained by intercepting telephone communications being transmitted over telephone instrument bearing the number Circle 5-7366, located at premises 56 West 56th Street, Borough of Manhattan, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, and that the ends of justice will be best served by authorizing the interception of messages; it is

ORDERED, that the Police Commissioner of the City of New York, or his duly authorized agents be, and they hereby are authorized and empowered to intercept, listen to, overhear and make copies of any and all telephonic communications made to and from or being transmitted over telephone instrument bearing the number Circle 5-7366, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Jay Manufacturing Company, for the purpose of obtaining evidence of the commission of crime and evidence leading to the detection and apprehension of persons engaged in the illegal taking of bets on horse races and other sporting events, and it is further

ORDERED, that the said Police Commissioner of the City of New York, or his duly authorized agents be and they hereby are authorized and empowered to tap and make connections with any and all wires leading to and from the said telephone instrument bearing the number Circle 5-7366, and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted; and it is further

ORDERED, that this order shall be effective until the 10th day of February, 1947.

Dated: City and County of New York,
December 10th, 1946.

(signed) Samuel Null
Justice of the Supreme Court
of the State of New York.

SAMUEL NULL

SECOND INTERCEPTION ORDER OF DECEMBER 10

Affidavit

SUPREME COURT — NEW YORK COUNTY

In the Matter

of

Intercepting Telephone Communications
Being Transmitted Over

Circle 5-5155

State of New York }
County of New York } ss.:

George W. McGirr, being first duly sworn, deposes and says:

That he is an Acting Lieutenant in the Police Department of the City of New York, assigned to Borough Headquarters Squad, Manhattan West.

That it is part of deponent's duties to make confidential investigations of crime and criminals and to apprehend criminals.

That deponent at the present time is attempting to secure evidence of violations of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, in violation of Section 986 of the Penal Law.

That deponent has been informed by persons in a position to know, and whom he believes to be telling the truth, that one "Sid" and one "Matty", whose full names are unknown, and other persons whose names are unknown to informants and deponent, are engaged in the illegal taking of bets on horse races and other sporting events, in violation of the Penal Law of the State of New York, at premises 56 West 56th Street, City, County and State of New York.

That the source of deponent's confidential information is not divulged in this affidavit, but deponent is ready and willing to disclose the source and nature of this confidential information to the Court.

That deponent has been informed that there is a private telephone located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc., and bearing the number Circle 5-5155.

That deponent believes that if he is permitted to intercept the telephone messages being transmitted over telephone Circle 5-5155, he will be able to obtain information against the said "Sid" and "Matty" and other persons engaged in the illegal taking of bets on horse races and other sporting events.

WHEREFORE, deponent requests an order permitting the Police Commissioner of the City of New York, or a duly authorized agent of the Police Department of the City of New York, to intercept any communications being transmitted over the telephone instrument Circle 5-5155, and permitting the Police Commissioner or his duly authorized representative to tap and make connections with any and all wires leading to and from the telephone instrument bearing the number Circle 5-5155, located at premises 56 West 56th Street, City, County and State of New York, and listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc.

That to deponent's knowledge, no previous application has been made by the Police Department of the City of New York for an order permitting the interception of messages over the aforementioned wire.

(signed) George W. McGirr

Sworn to before me this
10th day of December, 1946.

(signed) Michael G. O'Rourke

Notary Public, MICHAEL G. O'ROURKE
Bronx Co. Clk's No. 24, Reg. No. 32 O-8
N. Y. Co. Clk's No. 90, Reg. No. 94 O-8
Queens Co. Clk's No. 328, Reg. No. 52-O-8
Kings Co. Clk's No. 38, Reg. No. 75-O-8
Certificate filed in Richmond County
Commission Expires March 30, 1948

Order

SUPREME COURT — NEW YORK COUNTY

IN THE MATTER
OF
INTERCEPTING TELEPHONE COMMUNICATIONS
BEING TRANSMITTED OVER
CIRCLE 5-5155

Acting Lieutenant George W. McGirr, assigned to Borough Headquarters Squad, Manhattan West, of the Police Department of the City of New York, being now present before me and it appearing from his affidavit, sworn to on the 10th day of December, 1946, that there are reasonable grounds to believe that evidence of crime and evidence leading to the detection and apprehension of persons engaged in violation of the Penal Law of the State of New York, to wit, the illegal taking of bets on horse races and other sporting events, may be obtained by intercepting telephone communications being transmitted over telephone Circle 5-5155, located at 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc., and that the ends of justice will be best served by authorizing the interception of messages; it is

ORDERED, that the Police Commissioner of the City of New York or his duly authorized agents be, and they hereby are, authorized and empowered to intercept, listen to,

overhear and make copies of any and all telephonic communications made to and from or being transmitted over telephone instrument bearing the number Circle 5-5155, located at premises 56 West 56th Street, City, County and State of New York, listed in the records of the New York Telephone Company in the name of Darvie Jewels, Inc., for the purpose of obtaining evidence of the commission of crime and evidence leading to the detection and apprehension of persons engaged in the illegal taking of bets on horse races and other sporting events; and it is further

ORDERED, that the said Police Commissioner of the City of New York, or his duly authorized agents be, and they hereby are, authorized and empowered to tap and make connections with any and all wires leading to and from the said telephone instrument bearing the number Circle 5-5155, and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted; and it is further

ORDERED, that this order shall be effective until the 10th day of February 1947.

Dated: City, and County of New York,
December 10, 1946.

(signed) Samuel Null
Justice of the Supreme Court
of the State of New York.

SAMUEL NULL

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NEW YORK PENAL LAW

§1423. Injuring • • • telegraph, or other property.

A person who wilfully or maliciously displaces, removes, injures, or destroys:

• • •

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or who shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state • • •, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned • • • is punishable by imprisonment for not more than two years.

• • •

(New York Laws 1892, c. 372; id. 1911, c. 316)

Since the filing of this memorandum, an additional section has been added to the Penal Law (L. 1949, c. 519):

§552-a. Wire tapping instruments

A person who has in his possession any device, contrivance, machine or apparatus designed or commonly used for wire tapping or the interception of telephone communications under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for wire tapping or interception of telephone communications, or knowing the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he shall be guilty of a felony.

NEW YORK CONSTITUTIONAL CONVENTION

A New York State Constitutional Convention was convened at the State Capitol at Albany on April 5, 1938, to make recommendations for proposed changes in the existing State Constitution (convention 3-4). On June 15 the chairman of the Committee on the Bill of Rights introduced a proposal to embody within the Constitution a search and seizure guarantee modeled on the federal Bill of Rights, and to set up the instant telephone interception provision (convention 392, see *id.* 380, 424, 472, 536-537). The proposal was referred for further consideration to the Committee of the Whole, and during the following weeks went through more of the required parliamentary steps (convention 389, see *id.* 406, 589, 593-603).

Another proposal, introduced by John J. Dunnigan and also reported out by the Committee on the Bill of Rights, embodied the basic committee proposal on searches and interceptions (convention 90, 386, 472-473). It would, however, have engrafted on it a provision against the reception of illegally-obtained evidence which, applied to interceptions, would have barred all not made in accordance with the required procedure (convention 406-407, 408, 415). Various statements were read which had been made by State officials interested in the subject, and there was full debate (convention 358-568 *passim*, see *id.* 336-340, 368-374).

The following delegates to the Convention, pointing in the main to the threat of organized urban crime, spoke in support of maintaining the committee proposal substantially in the form originally introduced: Harold Riegelman, convention 414-417, Harry E. Lewis 424-432, Abbot Low Moffat 449-450, H. Duane Bruce 450-455, Riley H. Heath 466-469, Philip J. McCook 478-481, William F. Love 481-483, Francis Martin 497-503, O. Byron Brewster 507-508, Thomas J. Curran 522-529, George F. McNaughton 533-

534, Henry Hirschberg 534-544, Alfred E. Smith 544-546, William S. Bennet 554-558, Edgar J. Nathan, Jr. 558-559, Hamilton Fish, Jr. 562-565, James P. Hill 565-568 (see convention 26-29).

The following spoke in favor of the rival Dunnigan proposal: John J. Dunnigan, convention 358-367, 407-408, Frank E. Johnson 375-377, 408-412, Lithgow Osborne 412-414, Edward Weinfeld 417-424, Chauncey M. Hooper 444-449, George R. Fearon 455-466, Thomas B. Dyett 503-507, Max D. Steuer 508-522, Francis D. McGarey 529-533, Philip Halpern 546-554, Robert F. Wagner 559-562, 818-820 (see convention 26-29).

The Dunnigan amendment failed, and a number of other amendments were considered (convention 573-589, see *id.* 572). The committee proposal, without material alteration, was eventually adopted by the Convention (827). On August 26, along with various other constitutional proposals, it was referred by the Convention to the electors of the State for their rejection or approval (convention documents No. 15, pp. 15-16; No. 16, p. 6; No. 17, p. 1; No. 18, pp. 1-2). It was approved by the voters at a general election held on November 8, 1938 [New York Consol. Laws, Book 2 (McKinney, 1939) p. 98; see convention document No. 17, p. 1].

ARTICLE I OF THE NEW YORK CONSTITUTION

§12. [*Security against* • • • *interceptions*]*

• • •

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.

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* For the search and seizure part of this Section, see A4.

NEW YORK CODE OF CRIMINAL PROCEDURE

§813-a. Ex parte order for interception

An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same. (*New York Laws 1942, c. 924*)

DEBATES ON FEDERAL ACT

On June 15, 1938, in the House, Representative O'Connor of New York, in a debate on a bill to amend the Federal Communications Act in order to allow interceptions by federal officers, stated [83 Cong. Rec. (1938) 9453, see S. 3756 (75th Cong. 3d Sess. 1938)]:

Mr. O'Connor of New York. Will the gentleman yield?

Mr. Quinn. I yield to the gentleman from New York.

Mr. O'Connor of New York. It is so fundamental that it is one of the leading issues in the New York State constitutional convention, which is considering wire tapping and the use of information so obtained in any court. There are two schools of thought, the Federal school which prohibits it, and in some States they permit it. Mr. Justice Holmes had something to say about this dirty work, I think he called it, or dirty business. The Federal courts have almost invariably prohibited the use of evidence obtained by wire tapping. I do not know of a greater fundamental question that involves the liberties of our citizens. The gentleman says this may be done.

[Here the gavel fell.]

Mr. Fish. Mr. Speaker, I ask unanimous consent that the time of the gentleman from Pennsylvania [Mr. Quinn] may be extended 5 additional minutes.

The Speaker. Is there objection to the request of the gentleman from New York?

There was no objection.

Mr. O'Connor of New York. As I say, there is gathered in the State of New York now 168 of the leading citizens, including lawyers and judges, who are working on this problem. Editorials have been written on it. As

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I said, there are two schools of thought. The New York Times yesterday had an editorial to the effect a provision like this should not pass.

The gentleman stated that the head of a Department could authorize this wire tapping. The suggestion in New York, as made by the strong advocates of a similar bill is, there should be a court order in every instance; but the other school says that even with a court order wire tapping should not be permitted because it is an interference. I am not talking about gangsters nor am I defending gangsters. The head of a Department may determine that a distinguished citizen is about to commit a crime and tap his wires. I do not think a big question like this ought to be passed at this stage of the Congress.

See also 83 Cong. Rec. (1938) 4344, 6718 [S. Rept. 1790 (75th Cong. 3d Sess. 1938)], 7053-7054, 7213, 8581 [H. Rept. 2656 (75th Cong. 3d Sess. 1938)], 8831, 9452-9453, 9635-9637; H. R. 9898 (75th Cong. 3d Sess. 1938), 83 Cong. Rec. (1938) 3535.

On August 6, 1940, during debate on another proposed measure to allow such interceptions, Representatives Schafer of Wisconsin, Celler of New York and Robsion of Kentucky, spoke [86 Cong. Rec. (1940) 9948-9949, see H. J. Res. 571 (76th Cong. 3d Sess. 1940)]:

Mr. Schafer of Wisconsin. Under the law of the State of New York tapping telephone wires is a criminal offense, with a penalty, and I quote, "not to exceed 2 years imprisonment." The gentleman comes from the State of New York. Does he maintain that under this bill this Congress can grant authority to any Federal agency to willfully violate the law of the State of New York which provides a penalty of 2 years in the penitentiary for a violation of it?

Mr. Celler. I am very glad that the gentleman has asked that question because the gentleman is not conversant with the law in the State of New York. Last year we had a constitutional convention in the State of New York and our constitution was revised and changed, and in respect to wire tapping it reads as follows (sec. 12, par. 2, adopted Nov. 8, 1938):

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted, and the purpose thereof.

In other words, under the Constitution of the State of New York, wire tapping is now permitted in the State of New York for the interception and frustration of any kind of crime, no matter what it may be. All that we ask in the pending bill is the right to have wire tapping in the interest of national defense, in the specific cases mentioned; so that we have this anomalous situation: A New York City detective, or a detective upstate in New York can tap wires by getting an ex parte order from the court,

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whereas the F. B. I. agent in New York cannot do a darn thing relative to tracking down those Nazi agents, these Communists, and these other agents of foreign powers. That is an anomalous situation which we are trying to avoid by this bill.

• • •

Mr. Robsion of Kentucky: So that the bill before us more nearly safeguards the rights of the people from wire tapping than does the constitution of New York.

Mr. Celler. I thoroughly agree with the gentleman.

See also 86 Cong. Rec. (1940) 8219, 8300 [H. Rept. 2574 (76th Cong. 3d Sess. 1940)], 9943-9948 [H. Res. 537 (76th Cong. 3d Sess. 1940)], 9948-9952, 9964; H. J. Res. 553 (76th Cong. 3d Sess. 1940), 86 Cong. Rec (1940) 6955, A1471-1472.

On May 26, 1942, Representative Celler of New York stated [88 Cong. Rec. (1942) 4599, see H. J. Res. 310 (77th Cong. 2d Sess. 1942)]:

We could not conjure up any other limitations. We put every possible safeguard in the bill to protect the rights of all parties, all citizens anywhere, everywhere in the United States. We feel that in the interest of the war effort, we should have this legislation. My State of New York, for example, has in its constitution the right to tap wires, and to use the evidence obtained in the detection of crimes. If we do not pass this legislation, we will have an anomalous situation. For example, a New York City policeman could tap a wire, whereas an F.B.I. agent could not, and in addition use the evidence obtained thereby. That is a ridiculous situation and we must cure that [.]

See also 88 Cong. Rec. (1942) 3964, 4029 [H. Rept. 2079 (77th Cong. 2d Sess. 1942)], 4594-4602, 4605; H. R. 6919 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 3470; H. J. Res. 273 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 758, A288-289; H. J. Res. 283 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 1234; H. J. Res. 304 (77th Cong. 2d Sess. 1942), 88 Cong. Rec. (1942) 3626, 3688 [H. Rept. 2048 (77th Cong. 2d Sess. 1942)], 3930.

Cf. H. R. 4228 (77th Cong. 1st Sess. 1941), 87 Cong. Rec. (1941) 2762, 2849 [H. Rept. 358 (77th Cong. 1st Sess. 1941)], 5760-5767 [H. Res. 222 (77th Cong. 1st Sess. 1941)], 5768-5775, 5777-5781, 5786-5794, A2157-2158, A3204, A3293-3294; H. R. 2266 (77th Cong. 1st Sess. 1941), 87 Cong. Rec. (1941) 182; H. R. 3099 (77th Cong. 1st Sess. 1941), 87 Cong. Rec. (1941) 679.

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RESOLUTION FOR INVESTIGATION

On February 1, 1940, Senator Green of Rhode Island introduced the following resolution in the United States Senate [86 Cong. Rec. (1940) 889-890, S. Res. 224 (76th Cong. 3d Sess. 1940)]:

Resolved, That the Committee on Interstate Commerce is authorized and directed to make a full and complete investigation of alleged instances of (1) interception, by means of wire tapping or otherwise, of wire communications to or from officials and employees of the Federal, State, and local governments, and (2) installation of dictographs or similar devices for the purpose of listening to or recording conversations participated in by such officials and employees. The committee shall report to the Senate as soon as practicable the results of its investigation, together with its recommendation for the enactment of any remedial legislation it may deem necessary.

For the purposes of this resolution the committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places during the sessions and recesses of the Senate in the Seventy-sixth and succeeding Congresses, to employ and to call upon the executive departments for clerical and other assistants, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, to take such testimony, and to make such expenditures as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per hundred words. The expenses of the committee, which shall not exceed $15,000, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

REPORT AND AUTHORIZATION

On March 12 Senator Wheeler of Montana filed a report of the Senate Committee on Interstate Commerce approving the investigation. So far as here relevant, the report stated [S. Rept. No. 1304 (76th Cong. 3d Sess. 1940) at pp. 1, 7; see 86 Cong. Rec. (1940) 2693]:

The Senate Committee on Interstate Commerce to whom was referred the resolution (S. Res. 224) having considered the same, report thereon with the recommendations that it pass with an amendment [to increase the appropriation for expenses].

The resolution (S. Res. 224) proposes an investigation by the Senate Committee on Interstate Commerce of wire tapping and the use of dictographs and similar devices for listening to or recording conversations. While the resolution deals with the use of such methods against employees and officials of Federal, State, and local governments, it might appropriately be broadened to cover the use of such methods against any person, official or non-official. The proposed investigation is sufficiently broad to deal with wire tapping and use of dictographs by governmental or private persons, by governmental or private detective bureaus, a political party in power or a political party out of power, and whether employed for purposes of political or business advantage, in industrial espionage against a commercial competitor or against labor unions, or in the detection of crime.

• • •

Senate Resolution 224, which is recommended for passage, will provide a congressional inquiry useful to ascertain, in the words of Senator Norris to the Attorney General on the subject of current demands for a more

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sweeping inquiry into other phases of "dirty business" by Government police, "whether the legitimate rights and liberties of any of our people have been frustrated and denied," and will be useful to prevent activities whether by public or private spy systems which "are going to bring into disrepute the methods of our entire system of jurisprudence," and will help to insure that "the activities of its officials and officers [are] kept within the bounds of civilized government."

The importance of this investigation is great. Whether it be the use of wire-tapping or dictographs by those seeking to detect crime, or their use by those seeking to commit crime, the effect on our judicial and social systems is far-reaching. As is natural, hitherto the courts have had before them cases of the former type, but cases of the latter sort are bound to come before them, especially if adequate legislation is enacted to deal with this evil. The fundamental principles have already been enunciated by the courts, and legislation that may be proposed after an investigation conducted under the terms of this resolution should contribute largely to that end.

The resolution, without the proposed committee amendment to increase the appropriation, was adopted by the Senate on March 20 [*86 Cong. Rec.* (*1940*) *3116*]. *A special subcommittee of the Committee on Interstate Commerce, consisting of Senators Tom Stewart of Tennessee* (*chairman*), *Sherman Minton of Indiana, Harry H. Schwartz of Wyoming, Wallace H. White, Jr., of Maine, and Chan Gurney of South Dakota, was appointed to conduct the investigation* (*hearing 1-2*).

See also 86 Cong. Rec. (*1940*) *13254-13255, tabling a subsequent amendment to change the stated scope of investigation* [*S. Res. 323* (*76th Cong. 3d Sess. 1940*)].

SUBCOMMITTEE HEARINGS

On May 28, 1940, Matthew W. Goring, a former Special Assistant to the Attorney General of Rhode Island, testified before the United States Senate subcommittee which was charged with the investigation of State telephone interceptions (hearing 240-241):

Mr. Maloney [counsel to committee]. In the course of your discussion with Mr. Tyng [Assistant District Attorney of New York County] was the question of wire tapping brought up?

Mr. Goring. Oh, yes.

Mr. Maloney. Did you discuss that with Mr. Tyng?

Mr. Goring. I did.

Mr. Maloney. Did you tell him you contemplated doing some wire tapping in Rhode Island?

Mr. Goring. I didn't. In fact I didn't contemplate doing wire tapping in Rhode Island.

Mr. Maloney. Who mentioned wire tapping? Mr. Tyng?

Mr. Goring. I don't recall that.

The Chairman [Senator Stewart of Tennessee]. Is that an approved method of procuring evidence in New York?

Mr. Goring. Well, I was told by Mr. Tyng that it was a regular practice in investigations conducted by the office of the New York district attorney and that it was sanctified by order of the judge of a New York court of record.

The Chairman. Sanctified?

Mr. Goring. I selected that term with some care, but I don't want to be held down to it.

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Mr. Maloney. Mr. Goring, you have reference to the fact under the New York State Constitution it is permissible to obtain an order from the court of record in New York State by which order you are permitted to tap a telephone where there is evidence submitted to the court that a crime is being committed or the telephone is being used in the commission of a crime. That is what you are referring to when you say it has been sanctified?

Mr. Goring. I am referring to the practice that obtains in New York for obtaining an order from the court—from a court of record.

I am not referring to the assertions made which the judges—

The Chairman (interposing). Is there a statute in New York covering that?

Mr. Goring. I believe there is legislation or constitutional authority for that particular practice in New York, the theory being, if I get it right, that it is treated analogous to a search warrant.

I was informed by Mr. Tyng at the time, I think I am correct in saying, there was no case which had been prosecuted by the New York district attorney's office, or the office of the New York county attorney, in which evidence of conversations heard over a wire tap had been introduced.

Mr. Tyng and I both discussed that phase of the matter.

The Chairman. Just a moment. You are discussing the admissibility of certain evidence?

Mr. Goring. Discussing the application made by the law-enforcement authority of evidence obtained that way.

In other words, they did not introduce evidence of a conversation between A and B.

The Chairman. You mean to say the purpose of this statute, and we are interested in learning what the laws on

this subject might be, that the New York statute makes evidence so obtained admissible in court if it is obtained in the manner prescribed?

Mr. Goring. I think the substantial language of the constitutional provision is that no evidence obtained by wire tapping shall be admissible—

The Chairman (interposing). You do not mean the Constitution.

Mr. Maloney. Yes; it was adopted at a constitutional convention last year. It went into effect in 1939 and was adopted in 1938.

The Chairman. What was the provision?

Mr. Goring. Substantially that no evidence shall be admissible unless first authority to make the tap is obtained from a justice of a court of record. So, that in effect it makes such evidence with such procedural conditions admissible.

On November 20 Mr. John J. Robinson of the New York Telephone Company testified before the committee (hearing 648-650):

The Chairman [Senator Stewart]. In New York State there is, as I understand it, a law which permits wire tapping under certain conditions.

Mr. Robinson. That is correct, Senator.

The Chairman. When a wire tap might be made under this statute in New York State, is your company notified and do you collaborate?

Mr. Robinson. I can explain that to you, Senator.

The Chairman. Yes.

Mr. Robinson. On January 1939 a law was passed on that in New York, and it went into effect; as a matter of fact it was passed previously, as I recall, which made wire tapping legal under certain circumstances.

The Chairman. There was a constitutional amendment.

Mr. Robinson. Yes. And a police officer may go into court and make application to a judge for permission to tap wires under certain circumstances.

When the order is granted, a copy is presented to the telephone company, whereupon, the telephone company will request—rather, it is requested to furnish the cable and pairs for the particular line involved. Having gotten that, I take it, the police go out and make the physical tap.

The Chairman. They make the application to the telephone company?

Mr. Robinson. To the court first, and the copy of it, a copy of the order is served on us.

The Chairman. And they make application for certain apparatus?

Mr. Robinson. Not apparatus, but certain information as cable numbers and pairs and terminal locations.

The Chairman. So that they may tap the correct wire?

Mr. Robinson. Yes.

The Chairman. Has this been carried on quite a lot in New York State?

Mr. Robinson. I think, if I recall the figures correctly, speaking for Manhattan and the Bronx, since the law went into effect in January 1939, we have had 139 or 140 requests from the police department with these orders.

The Chairman. Within a period of about a year?

Mr. Robinson. About a year and a half.

The Chairman. You have had no requests this year, I imagine.

Mr. Robinson. Yes; I think this year they ran about, oh, I think, if my figures are correct, up to August 1, about 61.

The Chairman. Do you care to express any opinion or statement about wire tapping? What do you think about the wire-tapping law?

We should like to know whether you think it is a good thing or a proper thing under certain circumstances, or conditions, to aid in the tracing of a crime, certain types and character of crime.

Mr. Robinson. Well, I think perhaps under certain circumstances, if handled by the properly constituted authorities, it might serve a useful purpose.

However, I am a great believer of the fact it can be terribly abused.

The Chairman. What do you think about the New York statute, or rather, the constitutional amendment, I believe it is—

Mr. Robinson. That was so designed for the purpose of doing good, but whether it has or not, I am in no position to say.

The Chairman. What do you think about it as an effective means to reach crime?

Mr. Robinson. As I said, under certain circumstances, it has—and if handled by the properly constituted authorities and handled in the right hands, it might do some good.

The Chairman. In New York State it is required, is it not, that certain authorities handle it, the police authorities?

Mr. Robinson. I don't know just how tight the routine is and how easy to get those orders. I have never made application. It may be very easy, and if it is, the darn thing could be abused.

The Chairman. There is nothing in the law that gives the telephone company the right to make an objection to the tap. You must, as a routine matter, cooperate?

Mr. Robinson. I don't know. Not that I know of. We just have to give information.

The Chairman. Do you want to give an opinion as to how the New York statute works in New York?

Mr. Robinson. I don't know what result they have obtained.

The Chairman. You have learned more here about them than you knew before?

Mr. Robinson. I would not say that, but, answering your question, I haven't any knowledge whether the law has been effective along the lines they thought it might be. We only give the information. How the thing works physically, I don't know.

On November 20 Mr. Sol Gelb, an Assistant District Attorney in the New York County District Attorney's Office, testified before the committee (hearing 659-661):

The Chairman [Senator Stewart]. G-e-l-b.

Mr. Gelb, you have been for 5 years an assistant in charge of the prosecution of some criminal offenses all that period of time?

Mr. Gelb. Yes, sir.

The Chairman. During that time you have not had in New York State, as I am informed, any law giving you the right to tap wires and intercept telephone conversations except with the coming of the constitutional amendment which was adopted in November 1938. That went into effect, as I recall, November 1939. Then you had no legal method of wire tapping except under that statute or constitutional provision?

Mr. Gelb. No, Senator. Before that time the statute had provided any unauthorized tapping of a wire was illegal.

The Chairman. There was a statute prior to the constitutional amendment?

Mr. Gelb. Yes. For example, the police department of New York used to tap wires and nobody—at least, never was any prosecution brought against the police department.

The Chairman. Can you give us briefly the history of your constitutional amendment?

Why was it made a constitutional amendment rather than the old law or statute amended?

Mr. Gelb. The delegates felt the wire tapping should be somewhat curbed. They felt that reasons should be given before the wires should be tapped. So they amended

it today so that somebody will put himself on record and state why a certain wire should be tapped, and a supreme court justice will authorize tapping of that wire.

The Chairman. And then, as I understand the law, you have now, it requires that you appear before a court. Tell me what it provides?

Mr. Gelb. It provides before a wire can be tapped—and only by a law enforcement officer—an order must be obtained from a justice and a court of record and the order must be obtained on an affidavit made by the law enforcement official seeking to tap that wire.

The Chairman. In somewhat the methods used to prosecute a search warrant.

Mr. Gelb. That's right. Some cause must be shown.

The Chairman. And that is on an affidavit and petition jointly presented to a court of record—to the judge of the court of record.

Mr. Gelb. Yes, sir.

The Chairman. So as to give him discretion.

Mr. Gelb. Yes, sir.

The Chairman. Does the law state that must appear in the affidavit or petition?

Mr. Gelb. No, sir. The law does not state "cause shown."

The Chairman. Cause shown as to what—the law may be violated?

Mr. Gelb. I could not tell you offhand. I am not familiar with the wording, but I know you must give reason.

The precise wording I don't recall but in effect you have got to show some good cause. I think it is more definitive than that.

The Chairman. You are familiar with our statute?

Mr. Gelb. Yes.

The Chairman. Which was passed in 1934 as an amendment to the Federal Communications Law. We are interested in recommending to the Congress what should be done about this statute, whether it should be repealed, modified, strengthened, or whether anything should be done about it.

As a law-enforcement official and as a prosecutor, what is your opinion about the value of this type of evidence, in the first place, that might be obtained by tapping wires and inserting dictaphones, which is included in the law also?

What is your opinion of the value of that type of evidence in running down crime?

Mr. Gelb. I haven't given very much thought to it, except to absorb a record in working on various criminal prosecutions. I have found that wire-tapping serves a limited useful purpose, very limited. I know in prosecutions rarely, if ever, have we used a wire tap as evidence. I don't recall its use. The limited usefulness of wire tapping is in cases where an extensive investigation is started.

The Chairman. And you can procure leads.

Mr. Gelb. Into a racket. The wire tapping will reveal the picture of the operations of an extensive racket enterprise much more quickly and with much better clarity than would an investigation conducted over a period of months. That is the usefulness I have found in wire tapping. You can investigate a racket and find in 2 weeks you can get the set-up very clearly.

The Chairman. You get leads?

Mr. Gelb. You can find out what roles the principals play and examine witnesses more intelligently on the basis of the information you obtain at the inception of the investigation. It might take months of hard work to obtain the same type of information otherwise.

It probably could be obtained, but that is what I find.

The Chairman. In the year and a half, nearly 2 years now, that the law has been effective in New York State, I believe Mr. Robinson of the Telephone Co. said an employee of his had 150 requests made of the Telephone Co. to cooperate on orders of the court directing wires be tapped.

That is probably a rather large number of cases even in New York City, it seems to me. I don't know whether I am correct about that or not. At the same time the point I am making is that it appears to have been used a good deal.

Mr. Gelb. There are *15* [five] counties in New York [City] and over *1,800* [18,000] police. One would gather that the only activities that were carried on by the police that may constitute the use of wire taps is by Captain Dowd and District Attorney Dewey's office. There were *1,800* police and wire tappers working for the police department in the city of New York, which have nothing to do with the district attorney's office.

And why there were requests for 150 I cannot tell you. I can only speak for our office.

The Chairman. Do you know of any instances where court orders granting the permission to tap wires has been abused?

Mr. Gelb. I personally don't.

On December 11 Detective Kenneth Ryan of the New York City Police Department testified before the committee (hearing 817-819):

The Chairman [Senator Stewart]. You mean you have gotten valuable and worthwhile leads?

Mr. Ryan. Not so much leads. In New York we have five boroughs. We have our hands full to tail a man from Manhattan to Brooklyn. If we know where they congregate it saves quite a bit of work, of actually tailing them. If we lose them, we will be able to pick them up at that particular spot and we know just about when a job is coming off. It really helps us very much that way.

The Chairman. You mean when a job is coming off, what particular crime are they planning to commit?

Mr. Ryan. In this particular case I am referring to, it was a stick-up on Thirtieth Street, a fur shop. It was 3 months before.

The Chairman. That gave you a lead.

Mr. Ryan. It sure did.

The Chairman. It gives you a lead to the commission of the crime.

Mr. Ryan. We knew it was going to happen, but we didn't capitalize until we realized what was going to happen.

The Chairman. Do you think as a police officer you would have the—would you advocate the modification or lightening up of the present laws?

Mr. Ryan. The way it stands now, with a court order, I think it is fine.

The Chairman. That is confined to New York State. You are speaking of your own State?

Mr. Ryan. That is right, because you can go to the county judge; if he will sign a court order, you can use it.

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The Chairman. Somewhat the same procedure that you follow when you want a search warrant?

Mr. Ryan. Somewhat; yes.

The Chairman. You would not advocate the free use of wire tapping and placing dictographs without some restraint or restriction?

Mr. Ryan. There must be some restraint and restriction.

The Chairman. Would you confine it solely to law-enforcement officials, police departments, and sheriffs?

Mr. Ryan. I think I would, because there would be nobody else that would have use for them.

The Chairman. There might be others that would use them.

Mr. Ryan. That is perfectly true, as far as wire tapping is concerned. There may be a case now and then, or occasions, where dictograph recordings of conferences—we will say conferences over a telephone—where you might want to make a record if you had a conversation with somebody on business in England and you would want to refer back to some point and you would not want to call England again to verify it.

Outside of that, or any law-enforcement agency, I could not see any reason why anybody else would want to tap a wire.

Mr. Maloney. No other good reason.

Mr. Ryan. No other good reason.

• • •

The Chairman. Would you recommend restriction in the use of the dictograph and wire taps to any particular class of crime?

The Attorney General for the United States, I believe, suggested in cases of espionage, sabotage, and kidnapping—those three. The Government officials tell us they think it is all right to use in any of those three.

Mr. Ryan. Here is a different situation. Homicides, we have narcotics—narcotic cases, and we have had success in every one. I can enumerate 15 or 20 classifications of crime in which we have had success over the wire; that is, from the information received.

The Chairman. What would you think would be the effect on the underworld, in general, if the use was strictly prohibited, that the police department would not, or could not, lawfully use them?

Mr. Ryan. They would get along pretty well in a short time. It would be hard.

The Chairman. You think that would increase crime?

Mr. Ryan. I would not say necessarily increase it. It would facilitate crime. There would be no question about that.

• • •

Mr. Maloney. Mr. Ryan, it is the practice in New York State at the present time to secure an order from the judge of the supreme court?

Mr. Ryan. Yes; an affidavit is made up.

Mr. Maloney. And the judge signs it?

Mr. Ryan. And the judge signs it.

Mr. Maloney. That is done pursuant to an amendment to the constitution of the State?

Mr. Ryan. That is true.

Mr. Maloney. As far as you know, it is a practice of the police department to conform to that law at all times?

Mr. Ryan. Yes.

Mr. Maloney. You have no knowledge of where that law has been violated, and the police have gone ahead and tapped wires without getting an order?

Mr. Ryan. No, sir; as far as I know.

In *Olmstead* v. *United States,* 277 U. S. 438, 467-468, involving the legality of evidence secured through interceptions, the Court held such evidence admissible at common law.

In *Goldman* v. *United States,* 316 U. S. 129, 135-136, involving the analogous question of evidence secured by detectaphone, the Court ruled it similarly admissible.

In *Leon* v. *State* (1942) 180 Md. 279, 284, 23 Atl. (2d) 706, 709 [*cert. den. sub nom. Neal* v. *Maryland,* 316 U. S. 680] involving the intended scope of the present federal act, the court held it inapplicable to State courts.

Cf. People v. *Kelley* (1942) 122 Pac. (2d) 655, 658-660 (not officially reported), aff'd 22 Cal. (2d) 169, 137 Pac. (2d) 1, appeal dism. 320 U. S. 715; *People* v. *Vertlieb* (1943) 22 Cal. (2d) 193, 195-196, 137 Pac. (2d) 437, 438; *People* v. *Barnhart* (1944) 66 Cal. App. (2d) 714, 722-723, 153 Pac. (2d) 214, 219; *People* v. *Onofrio* (1944) 65 Cal. App. (2d) 584, 585, 588, 151 Pac. (2d) 158, 159, 160-161; *Rowan* v. *State* (1939) 175 Md. 547, 555-556, 559-560, 3 Atl. (2d) 753, 756, 758; *Hitzelberger* v. *State* (1938) 174 Md. 152, 168, 197 Atl. 605, 612; *Matter of Harlem Check Cashing Corp.* v. *Bell* (1946) 296 N. Y. 15, 17-18, 68 N. E. (2d) 854, 855. See, also, *Olmstead* case, 277 U. S. at p. 469.

CASES DISTINGUISHED

In *Nardone* v. *United States*, 302 U. S. 379 (Stemmer pp. 4, 5, 6, 8, Krakower pp. 3, 5, 10, 13), the Court declared that the present act regulated the official morality of federal officers.

In *Weiss* v. *United States*, 308 U. S. 321 (Stemmer pp. 4, 6, 7, Krakower pp. 5, 10, 14) the Court held that the act barred all intercepted evidence from federal courts.

None of the cases upon which petitioners rely (Stemmer pp. 4-8, Krakower pp. 3-5, 10-14) held it applicable to State courts.

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Supreme Court of the United States

October Term, 1948

Nos. 567, 568

HARVEY STEMMER and DAVID KRAKOWER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING

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Supreme Court of the United States

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Nos. 567, 568

HARVEY STEMMER and DAVID KRAKOWER,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners Harvey Stemmer and David Krakower respectfully ask this Court to grant a rehearing of the decision rendered by this Court on May 2, 1949, affirming by an equally divided Court their conviction by the Courts of the State of New York.

On April 4, 1949, this Court granted petitioners' applications to review the judgment of the Court of Appeals of the State of New York (reported in 298 N. Y. 728), which affirmed a judgment of the Appellate Division of the Supreme Court of that state (reported in 273 App. Div. 854), which latter judgment affirmed a conviction of the petitioners in the Court of General Sessions of the County of New York for conspiracy and bribery. The questions presented for consideration by this Court were whether or not the Federal Communications Act prohibited

the disclosure of telephone conversations by a state law enforcement agent, and, if so, whether a state court might listen to such divulgence and use the evidence thus disclosed as a basis for convicting persons accused of crime. These questions have never heretofore been passed upon by this Court.

Because both petitioners are presently confined in the penitentiary, counsel arranged to have the writs of certiorari herein promptly argued, and no further briefs were filed in addition to those submitted at the time of the making of the applications for certiorari. Argument of the writs was heard by this Court on April 22nd and 25th, 1949.

There can be no doubt that the questions presented are of national importance. Wire tapping evidence has frequently been used in state courts to support convictions of crime. It is in the public interest that it be determined whether or not this is prohibited by federal law.*

Petitioners take the liberty of urging Mr. Justice Jackson to reconsider his decision not to participate in this case so that there can be a determination of the important issues here involved.

Petitioners are also amplifying some matters advanced on the argument, in the hope that this may be helpful to the Court when giving further consideration to the present problem.

1. With respect to the question of interstate messages, it shou'd be pointed out that in addition to the interstate message to which petitioner Stemmer was a party, but

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* The threat of disclosure of information secured by wire tapping is often a fruitful source of the crime of blackmail, as well as a means of apprehension and conviction of crime. For this reason alone, public policy dictates its abolition.

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which appears not to have been read to the trial court (See R. 64, 65), the contents of a number of interstate messages were actually testified to at the trial and allowed in evidence against all of the defendants (Exs. 5D, R. 47; 5J, R. 52; 5K, R. 53; 5M, R. 56). While neither of petitioners was a party to these conversations, that circumstance should make no legal difference, since there is no contention that the parties to the conversations consented to their divulgence. There is nothing in *Goldstein* v. *United States,* 316 U. S. 114, which requires any different result. In that case the messages themselves were not divulged in the trial court. This Court held merely that the prohibition against divulgence did not go so far as to prohibit the use of information obtained as the result of wire taps, where none of the defendants was a party to the conversations overheard.

We submit, moreover, that even if there were no interstate messages at all, the ruling in the *Weiss* case is applicable to the case at bar and brands as illegal the divulgence of the intrastate messages to which petitioners concededly were parties. Indeed, on the argument herein counsel for the State of New York did not challenge this view.

2. Counsel for the State of New York rested his argument that state officers were not included in the ban on the Federal Communications Act primarily on the fact that certain members of Congress, when debating proposals to amend the Communications Act, had assumed that the New York practice authorized wire tapping. But a careful reading of the debates which then occurred (86 Congressional Record, 9943–52, and 88 Congressional Record, 4595–4602) shows that no question of conflict between the federal law and the state practice was considered and that Congress was primarily concerned with the propriety of

granting the request of the federal government to permit its agents to tap wires in certain limited situations. The argument that Congress was considering placing federal law enforcement agents on an "equality" with state law enforcement agents is wholly specious, for the proposals before Congress would have permitted wire tapping by federal law enforcement agents only in cases having to do with national security and then only for a limited period of time. The proposals were expressly described as war measures. The reference by Congressman Celler to the New York practice was purely incidental. There is no basis for inferring that the motivation which induced the House of Representatives to approve the proposals then before it rested on any belief that state law enforcement agents were exempt from the ban of the federal law. In any case, the proposed measures did not become law. See *Goldstein* v. *United States*, 316 U. S. 114, 129, note 5.

Surely the state's argument on this subject cannot overcome the plain, comprehensive and all-embracing words of the statute and justify the conclusion that they should be rewritten by this Court so as to add a proviso "that this statute shall not apply to any state law enforcement agencies".

In this connection we call attention to *Hines* v. *Lowrey*, 305 U. S. 85. In that case Congress limited the amount of fees which might be paid to attorneys in connection with veterans' matters. Although there was no express reference to state courts this Court held that no state court could allow a fee larger than the one fixed by Congress.

3. There can be no doubt that if the federal communications statute be given the meaning which the plain words of the statute require so that *all* persons are barred

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from divulgence, then no state constitution or statute can nullify this federal law. As Mr. Justice Black said in *Kalb* v. *Feuerstein*, 308 U. S. 433, at p. 439:

> "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land."

4. There is a consideration in this case which was not developed during the argument and may not, perhaps, have been brought to the attention of the Court. The question whether or not the Federal Communications Act does apply to divulgence by state as well as federal law enforcement officers is, of course, a federal question on which the decision of this Court alone can be final It is important in the public interest that there be such a decision so that state law enforcement officers shall have an authoritative guide for their future conduct and that state courts be informed of the view of this Court on that question.

It may, however, not necessarily follow if this Court accepts petitioners' view on this matter that state courts are prevented from receiving the contents of wire taps in evidence. The extent to which this Court may pass on the right of a state court to receive evidence, in the absence of a specific Congressional directive on the subject, is a question which we conceive to be much more troublesome than the question of the proper interpretation of the Federal Communications Act. To some extent this Court has that same question before it in Nos. 17 and 18, *Wolf* v. *Colorado*, which were argued last October but have not yet been decided. Those cases deal with searches and seizures claimed to have been unlawful and present a challenge to the right of a state court to receive the seized material in evidence.

It is possible, we suggest therefore, that this Court might conclude that the Federal Communications Act bars the divulgence of wire taps by state law enforcement officers, as well as federal law enforcement officers, and yet determine that it is for the state court to decide whether, in the face of this Court's declaration that the divulgence constitutes a violation of a federal law, it would nevertheless countenance the reception of such evidence.

A disposition of this case along these lines would at least definitely clarify the law so far as the meaning of the Federal Communications Act is concerned, while leaving it to the good judgment of each state court of last resort to determine how the law shall be applied to the demands of its own law enforcement agencies to present to its courts evidence the very giving of which constitutes a federal crime.

5. Finally, we suggest that the problem of affirmances by an equally divided Court is one which this Court may feel requires legislative solution. There have so far been five of such affirmances at this Term of the Court, several of them involving issues of great public importance. This situation has been called to the attention of the Chairmen of the respective Judiciary Committees of the House and Senate in the hope that legislation may be enacted which would prevent the recurrence of such stalemates in the future.

There are, of course, several different ways by which this problem can be approached. The simplest solution might be to provide that in the event that one of the Justices of the Court disqualified himself, then the remaining most recently appointed Justice should also be required not to participate in the decision. While that proposed solution would not take care of the case where

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more than one of the Justices of this Court disqualified himself, such a situation has been of rare occurrence. At least this proposed solution would have taken care of the problem in all five of the cases which arose at the instant Term. We respectfully suggest to the Court that if the Court is not prepared to revise its previous decision, it nevertheless hold decision on the pending application for a rehearing in abeyance at least long enough to ascertain whether there is any likelihood of action by the Congress on the proposed legislation, so that the case may be on the docket of this Court should any law be enacted.

WHEREFORE, petitioners pray that this Court grant petitioners a rehearing. Petitioners further pray that Mr. Justice Jackson reconsider his reasons for not participating in this case in the light of the equally divided Court and that he participate in the hearing of further argument, and, if necessary, in the final decision of this case.

Counsel represent to the Court that this petition for rehearing and other relief is not filed for the purpose of delay.

May 13, 1949

Yours respectfully,

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MAY 2, 1949.

Per Curiam Decisions.

No. 567. STEMMER *v.* NEW YORK; and

No. 568. KRAKOWER *v.* NEW YORK. Certiorari, 336 U. S. 943, to the Court of Appeals of New York. Argued April 22, 25, 1949. Decided May 2, 1949. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of these cases. *Osmond K. Fraenkel* argued the cause for petitioner in No. 567. With him on the brief were *Arthur Garfield Hays* and *Sidney Struble*. *Harry G. Anderson* argued the cause for petitioner in No. 568. With him on the brief was *Harris B. Steinberg*. *Whitman Knapp* argued the cause for respondent. With him on the brief were *Frank S. Hogan* and *Charles W. Manning*. Reported below: 298 N. Y. 728, 83 N. E. 2d 141.